73 Am. Jur. 2d Subrogation Summary

American Jurisprudence, Second Edition | May 2021 Update

Subrogation
Lucas D. Martin, J.D.

Correlation Table

Summary

Scope:
This article treats the law of subrogation and discusses the nature, origin, basis, and scope of the doctrine; the conditions and principles governing it; the effect of subrogation and the rights acquired; the circumstances under which it may be sought; and the procedure to obtain it. The article includes applications of the doctrine to various relations and situations such as those of suretyship, co-obligors, vendors and purchasers, mortgagors and mortgagees, payment of taxes or assessments by persons not primarily liable, and others.

Treated Elsewhere:
Automobile insurer's right of subrogation, generally, see Am. Jur. 2d, Automobile Insurance §§ 576 to 583

Bankruptcy proceedings, subrogation rights in, see Am. Jur. 2d, Bankruptcy §§ 2554, 2634, 2679, 3309, 3571

Carriers, subrogation of insurer who has paid owner value of goods lost while in the custody of a carrier, see Am. Jur. 2d, Carriers § 570

Contribution, see Am. Jur. 2d, Contribution §§ 1 to 128

Corporations, subrogation of loans to officers, directors, employees, and agents of the corporation, see Am. Jur. 2d, Corporations § 1512

Cotenant, who pays joint obligation or satisfies lien on common property, subrogation rights of, see Am. Jur. 2d, Cotenancy and Joint Ownership § 64

Employer's rights against negligent employee, subrogation of insurer paying loss to, see Am. Jur. 2d, Employment Relationship § 408

Executors and administrators, subrogation rights regarding, see Am. Jur. 2d, Executors and Administrators §§ 350, 365, 793

Fidelity bond, subrogation rights of surety on, see Am. Jur. 2d, Fidelity Bonds and Insurance §§ 112, 113

Guarantor who makes good principal's default, subrogation of, see Am. Jur. 2d, Guaranty § 99

Indemnity, see Am. Jur. 2d, Indemnity §§ 1 to 39

Insurer's right of subrogation, generally, see Am. Jur. 2d, Insurance §§ 1768 to 1808

Judicial sale, subrogation rights of purchaser at, see Am. Jur. 2d, Judicial Sales § 122

Junior creditor, subrogation to senior encumbrancer's rights, see Am. Jur. 2d, Marshaling Assets and Inverse Order of Alienation § 33

Laborers and materialmen, right to be subrogated to lien of, see Am. Jur. 2d, Mechanics' Liens § 93

Mortgagor, subrogation of insurer who has paid loss to mortgagee to the latter's rights against, see Am. Jur. 2d, Insurance § 1786; Am. Jur. 2d, Mortgages § 236

Negotiable instrument, subrogation of accommodation party who pays, see Am. Jur. 2d, Bills and Notes § 444

Pollution, action for compensation under Superfund pursuant to CERCLA as a result of, see Am. Jur. 2d, Pollution Control § 1246

Public officers and employees, subrogation rights of sureties on bonds of, see Am. Jur. 2d, Public Officers and Employees § 498

Restitution and implied contracts, see Am. Jur. 2d, Restitution and Implied Contracts §§ 1 to 173

Suretyship, generally, see Am. Jur. 2d, Suretyship §§ 1 to 177

Tax collector's bonds, subrogation rights of sureties on, see Am. Jur. 2d, State and Local Taxation § 793

Trustee's right of exoneration, subrogation to, see Am. Jur. 2d, Trusts § 620

Workers' compensation, subrogation rights of employer as to third party causing injury to employee resulting in payment of, see Am. Jur. 2d, Workers' Compensation §§ 460 to 463

Research References:

Westlaw Databases

American Law Reports (ALR)
West's A.L.R. Digest (ALRDIGEST)
American Jurisprudence 2d (AMJUR)
American Jurisprudence Legal Forms 2d (AMJUR-LF)
American Jurisprudence Proof of Facts (AMJUR-POF)
American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)

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I. In General

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Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 2, 27

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 1, 2, 27

Trial Strategy

Proof of Excess Insurer's Cause of Action Against Primary Insurer, 28 Am. Jur. Proof of Facts 3d 507

Forms

Am. Jur. Legal Forms 2d §§ 205 to 207, 241:4 to 241:8
Am. Jur. Pleading and Practice Forms, Captions, Prayers, and Formal Parts § 365

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I. In General

§ 1. Definitions

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West's Key Number Digest

West's Key Number Digest, Subrogation 1

Trial Strategy

Proof of Excess Insurer's Cause of Action Against Primary Insurer, 28 Am. Jur. Proof of Facts 3d 507

"Subrogation" is broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right.[1] "Subrogation" refers to both a legal right and a legal action.[2] The right of subrogation is purely derivative,[3] and it permits a party who has been required to satisfy a loss created by a third party's wrongful act to step into the shoes of the loser and pursue recovery from the responsible wrongdoer.[4] Stated another way, it is a substitution of one person in place of another with reference to a lawful claim, demand, or right so that he who is substituted succeeds to the rights of the other in relation to a debt or claim and its rights, remedies, or securities.[5] Subrogation is a device adopted by equity to compel the ultimate discharge of an obligation by, or impose ultimate responsibility for, a loss on a party who in good conscience ought to pay it.[6] Subrogation puts one to whom a particular right does not legally belong in the position of the legal owner of that right.[7]

Observation:

Subrogation is an equitable doctrine whereby the initial tortfeasor/defendant is placed "in the shoes" of the plaintiff; it is a legal device founded on the proposition of doing justice without regard to form, and it is designed to afford relief where one is required

to pay a legal obligation which ought to have been met, either wholly or partially, by another.[8] In other words, "subrogation" is the right of one who has paid an obligation which another should have paid to be indemnified by the other.[9]

CUMULATIVE SUPPLEMENT

Cases:

"Subrogation" simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against a third party. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

[END OF SUPPLEMENT]

Footnotes

1 Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000); State Bar of California v. Statile, 168 Cal. App. 4th 650, 86 Cal. Rptr. 3d 72 (1st Dist. 2008); Mid-Century Ins. Co. v. Travelers Indem. Co. of Illinois, 982 P.2d 310 (Colo. 1999); Jeffries v. Kent County Vocational Technical School Dist. Bd. of Educ., 743 A.2d 675 (Del. Super. Ct. 1999); State Farm Mut. Auto. Ins. Co. v. Johnson, 18 So. 3d 1099 (Fla. 2d DCA 2009); Newsome v. Department of Administrative Services, 241 Ga. App. 357, 526 S.E.2d 871 (1999); State for Use and Benefit of Ameron, Inc. v. Tradewinds Elec. Service & Contracting Inc., 80 Haw. 218, 908 P.2d 1204 (1995); Davis v. Idaho Dept. of Health and Welfare, 130 Idaho 469, 943 P.2d 59 (Ct. App. 1997); Matter of Lehman, 690 N.E.2d 696 (Ind. 1997); East Boston Sav. Bank v. Ogan, 428 Mass. 327, 701 N.E.2d 331 (1998); Atlanta Intern. Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294 (1991); Genoa Banking Co. v. Tucker, 184 Ohio App. 3d 303, 2009-Ohio-4918, 920 N.E.2d 1006 (6th Dist. Wood County 2009), appeal not allowed, 124 Ohio St. 3d 1474, 2010-Ohio-354, 921 N.E.2d 246 (2010).

2 Wilson v. Farm Bureau Mut. Ins. Co., 770 N.W.2d 324 (Iowa 2009).

3 Crowley Maritime Corp. v. Boston Old Colony Ins. Co., 158 Cal. App. 4th 1061, 70 Cal. Rptr. 3d 605 (1st Dist. 2008); Mendez v. Allstate Property and Cas. Ins. Co., 231 S.W.3d 581 (Tex. App. Dallas 2007).
Subrogation requires an underlying and independent legal basis upon which a party may assert its claims. Bierman v. Hunter, 190 Md. App. 250, 988 A.2d 530 (2010).

4 Fireman's Fund Ins. Co. v. Maryland Casualty Co., 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762 (4th Dist. 1994); Wolf v. Spariosu, 706 So. 2d 881 (Fla. 3d DCA 1998), cause dismissed (Fla. May 20, 1998); State for Use and Benefit of Ameron, Inc. v. Tradewinds Elec. Service & Contracting Inc., 80 Haw. 218, 908 P.2d 1204 (1995); Pulte Home Corp. v. Parex, Inc., 174 Md. App. 681, 923 A.2d 971 (2007), judgment aff'd, 403 Md. 367, 942 A.2d 722, 65 U.C.C. Rep. Serv. 2d 430 (2008); Frymire Engineering Co., Inc. ex rel. Liberty Mut. Ins. Co. v. Jomar Intern., Ltd., 259 S.W.3d 140 (Tex. 2008); Szalacinski v. Campbell, 314 Wis. 2d 286, 2008 WI App 150, 760 N.W.2d 420 (Ct. App. 2008).

5 Financial Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276 (11th Cir. 2007); Cureton v. Frierson, 41 Ark. App. 196, 850 S.W.2d 38 (1993); Valley Casework, Inc. v. Comfort Construction, Inc., 76 Cal. App. 4th 1013, 90 Cal. Rptr. 2d 779, 100 A.L.R.5th 771 (4th Dist. 1999); Wolf v. Spariosu, 706 So. 2d 881 (Fla. 3d DCA 1998), cause dismissed (Fla. May 20, 1998); State for Use and Benefit of Ameron, Inc. v. Tradewinds Elec. Service & Contracting Inc., 80 Haw. 218, 908 P.2d 1204 (1995); Matter of Lehman, 690 N.E.2d 696 (Ind. 1997); Countryside Co-op. v. Harry A. Koch Co., 280 Neb. 795, 790 N.W.2d 873 (2010); Feigenbaum

v. Guaracini, 402 N.J. Super. 7, 952 A.2d 511 (App. Div. 2008); Ohio Bur. of Workers' Comp. v. McKinley, 130 Ohio St. 3d 156, 2011-Ohio-4432, 956 N.E.2d 814 (2011); Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wash. App. 765, 189 P.3d 195 (Div. 1 2008).

6 Ramos-Silva v. State Farm Mut. Ins. Co., 300 Ga. App. 699, 686 S.E.2d 345 (2009); Nationwide Mut. Fire Ins. Co. v. T and N Master Builder and Renovators, 2011 IL App (2d) 101143, 355 Ill. Dec. 173, 959 N.E.2d 201 (App. Ct. 2d Dist. 2011); Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co., 978 S.W.2d 754 (Ky. Ct. App. 1998); Tucker v. Holder, 359 Mo. 1039, 225 S.W.2d 123 (1949); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007); U.S. Bank Nat. Ass'n v. Hylton, 403 N.J. Super. 630, 959 A.2d 1239 (Ch. Div. 2008); General Creditors of Harris' Estate v. Cornett, 1966 OK 64, 416 P.2d 398 (Okla. 1966); Wimer v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 627, 939 A.2d 843 (2007); Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wash. App. 765, 189 P.3d 195 (Div. 1 2008).

7 WEA Ins. Corp. v. Freiheit, 190 Wis. 2d 111, 527 N.W.2d 363 (Ct. App. 1994).

8 Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702 (Fla. 1980); Davis v. Idaho Dept. of Health and Welfare, 130 Idaho 469, 943 P.2d 59 (Ct. App. 1997).

9 In re Kizzee-Jordan, 626 F.3d 239 (5th Cir. 2010) (applying Texas law); Bussen v. BE&K Const. Co., 728 So. 2d 617 (Ala. Civ. App. 1997), rev'd on other grounds, 728 So. 2d 621 (Ala. 1998); Countryside Co-op. v. Harry A. Koch Co., 280 Neb. 795, 790 N.W.2d 873 (2010).

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I. In General

§ 2. Goals and purposes of subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

The goal of subrogation is to place the burden of the debt or loss upon the person who should bear it.[1] Subrogation is intended, inter alia, to provide relief against loss and damage to a meritorious creditor who has paid the debt of another.[2] Other goals and purposes include restitution;[3] doing justice,[4] including "essential justice";[5] and to prevent unjust enrichment at the expense of another,[6] as well as avoiding double recoveries.[7] Stated another way, the purpose of subrogation is to prevent injustice;[8] it is designed to compel the ultimate payment of an obligation by the person who in justice, equity, and good conscience should pay it.[9]

Caution:

Despite the broad and just goals of subrogation, its use is not appropriate in every instance—for example, it is not appropriately used in standby letter of credit transactions,[10] although not all courts agree with this rule.[11] However, the converse is also true—it is not a limited doctrine such that there is no general rule of law or equity that holds that subrogation may be had only against a tortfeasor.[12]

Footnotes

1 Pusl v. Means, 2009 PA Super 192, 982 A.2d 550 (2009), appeal denied, 605 Pa. 715, 991 A.2d 313 (2010); Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007).
The purpose of subrogation is to put the financial consequences on the party responsible for the loss. Matsyuk v. State Farm Fire & Cas. Co., 155 Wash. App. 324, 229 P.3d 893 (Div. 1 2010), review granted, 170 Wash. 2d 1008, 249 P.3d 624 (2010) and rev'd on other grounds by 2012 WL 402050 (Wash. 2012).
The purpose of subrogation is to provide for a proper allocation of payment responsibility. Community Ass'n Underwriters of America, Inc. v. Kalles, 164 Wash. App. 30, 259 P.3d 1154 (Div. 2 2011).

2 Pulte Home Corp. v. Parex, Inc., 174 Md. App. 681, 923 A.2d 971 (2007), judgment aff'd, 403 Md. 367, 942 A.2d 722, 65 U.C.C. Rep. Serv. 2d 430 (2008).

3 G.E. Capital Mortg. Services, Inc. v. Levenson, 338 Md. 227, 657 A.2d 1170 (1995).

4 Poteet v. Sauter, 136 Md. App. 383, 766 A.2d 150 (2001); Time Ins. Co. v. Opus Corp., 519 N.W.2d 470 (Minn. Ct. App. 1994); Mead Corp. v. Dixon Paper Co., 907 P.2d 1179, 29 U.C.C. Rep. Serv. 2d 1291 (Utah Ct. App. 1995); Bush v. Richardson, 199 W. Va. 374, 484 S.E.2d 490 (1997).

5 Aybar v. New Jersey Transit Bus Operations, Inc., 305 N.J. Super. 32, 701 A.2d 932 (App. Div. 1997); Guilford County ex rel. Holt v. Puckett, 191 N.C. App. 693, 664 S.E.2d 362 (2008).

6 Egeli v. Wachovia Bank, N.A., 184 Md. App. 253, 965 A.2d 87 (2009); Bank of America v. Babu, 340 S.W.3d 917 (Tex. App. Dallas 2011), reh'g overruled, (June 21, 2011) and rule 53.7(f) motion granted, (Sept. 14, 2011); Estate of Otto v. Physicians Ins. Co. of Wisconsin, Inc., 305 Wis. 2d 198, 2007 WI App 192, 738 N.W.2d 599 (Ct. App. 2007), decision aff'd, 2008 WI 78, 311 Wis. 2d 84, 751 N.W.2d 805 (2008).

7 Mid-Century Ins. Co. v. Travelers Indem. Co. of Illinois, 982 P.2d 310 (Colo. 1999); Ochoco Lumber Co. v. Fibrex & Shipping Co., Inc., 164 Or. App. 769, 994 P.2d 793, 40 U.C.C. Rep. Serv. 2d 530 (2000); Ellsworth v. Schelbrock, 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764 (2000).
Subrogation has the objective of preventing an insured from recovering twice for one harm as would be the case if he or she could recover from both the insurer and from a third person who caused the harm. Warning Lights and Scaffold Service, Inc. v. O and G Industries, Inc., 102 Conn. App. 267, 925 A.2d 359 (2007).

8 Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 258 P.3d 281 (Ct. App. Div. 1 2011), review granted, (Nov. 29, 2011) and opinion aff'd, 2012 WL 1138251 (Ariz. 2012); Allstate Ins. Co. v. Palumbo, 296 Conn. 253, 994 A.2d 174 (2010).

9 Allstate Ins. Co. v. Palumbo, 296 Conn. 253, 994 A.2d 174 (2010); Blue Cross and Blue Shield of Montana, Inc. v. Montana State Auditor, 2009 MT 318, 352 Mont. 423, 218 P.3d 475 (2009); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007).

10 Mead Corp. v. Dixon Paper Co., 907 P.2d 1179, 29 U.C.C. Rep. Serv. 2d 1291 (Utah Ct. App. 1995).

11 Ochoco Lumber Co. v. Fibrex & Shipping Co., Inc., 164 Or. App. 769, 994 P.2d 793, 40 U.C.C. Rep. Serv. 2d 530 (2000).

12 Millers Nat. Ins. Co. v. City of Milwaukee, 184 Wis. 2d 155, 516 N.W.2d 376 (1994).

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I. In General

§ 3. Kinds and classifications

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 27

There are several types of subrogation recognized in the law; for example, there is "conventional" and "legal" or "equitable" subrogation.[1] The terms "legal subrogation" and "equitable subrogation" are synonymous.[2] The distinction between conventional and equitable subrogation has not been abolished in every circumstance.[3]

Additionally, in some cases and jurisdictions, there are forms of statutory subrogation.[4] Statutory subrogation arises by an act of the legislature that vests a right of subrogation with a party or category of parties,[5] and it is governed by the terms of the statute under which it is claimed as a matter of statutory construction.[6]

Practice Tip:

The three categories of subrogation—legal, conventional, and statutory—exist independently of each other,[7] and the nonexistence of one does not per se exclude a finding of the other.[8]

CUMULATIVE SUPPLEMENT

Cases:

While a subrogation action may be based on equitable principles independent of any agreement, such action may also be founded on a contract incorporating those principles. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

Purported mortgagee was not entitled to contractual subrogation in action in which purported mortgagee sought to assert priority of a lien against purchaser of property, seller of property, and credit union; there was no evidence of an express agreement subrogating purported mortgagee to the original mortgage on the property at issue, mortgagee did not record his lien, and even if mortgagee's lis pendens notice was considered, a release deed for the original mortgage had been recorded the previous year. Paliatka v. Bush, 2018 IL App (1st) 172435, 424 Ill. Dec. 583, 109 N.E.3d 343 (App. Ct. 1st Dist. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Bayou Steel Corp. v. Evanston Ins. Co., 354 Fed. Appx. 9 (5th Cir. 2009); Commercial Standard Ins. Co. v. American Emp. Ins. Co., 209 F.2d 60 (6th Cir. 1954); Financial Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276 (11th Cir. 2007); State Farm Mut. Auto. Ins. Co. v. Cox, 271 Ga. 77, 515 S.E.2d 832 (1999); North American Ins. Co. v. Kemper Nat. Ins. Co., 325 Ill. App. 3d 477, 259 Ill. Dec. 448, 758 N.E.2d 856 (1st Dist. 2001); Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co., 978 S.W.2d 754 (Ky. Ct. App. 1998); Poteet v. Sauter, 136 Md. App. 383, 766 A.2d 150 (2001); Hartford Acc. & Indem. Co. v. Used Car Factory, Inc., 461 Mich. 210, 600 N.W.2d 630 (1999); Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010); Armstrong v. Mississippi Farm Bureau Cas. Ins. Co., 66 So. 3d 188 (Miss. Ct. App. 2011), cert. denied, 65 So. 3d 310 (Miss. 2011); Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021 (2011); Combined Ins. v. Shurter, 258 Neb. 958, 607 N.W.2d 492 (2000); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007); City of Union City v. Veals, 247 N.J. Super. 478, 589 A.2d 1028 (App. Div. 1991); Viacom Intern., Inc. v. Midtown Realty Co., 193 A.D.2d 45, 602 N.Y.S.2d 326 (1st Dep't 1993); Consolidated Grain & Barge Co. v. Structural Systems, Inc., 2009 OK 14, 212 P.3d 1168 (Okla. 2009); U.S. Inv. and Development Corp. v. Rhode Island Dept. of Human Services, 606 A.2d 1314 (R.I. 1992); Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000); Texas Health Ins. Risk Pool v. Sigmundik, 315 S.W.3d 12 (Tex. 2010); Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wash. 2d 411, 191 P.3d 866 (2008); Steffens v. BlueCross BlueShield of Illinois, 2011 WI 60, 335 Wis. 2d 514, 804 N.W.2d 196 (2011).

2 Osterman v. Baber, 714 N.E.2d 735 (Ind. Ct. App. 1999).

3 Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000).

4 Ryder v. State Farm Mut. Auto. Ins. Co., 371 Ark. 508, 268 S.W.3d 298 (2007); Trevino v. HHL Financial Services, Inc., 945 P.2d 1345 (Colo. 1997), as modified on denial of reh'g, (Oct. 20, 1997); State, Dept. of Labor and Employment Sec., Div. of Worker's Compensation, Bureau of Crimes Compensation v. Livingston, 592 So. 2d 721 (Fla. 2d DCA 1991); State Farm Mut. Auto. Ins. Co. v. Cox, 271 Ga. 77, 515 S.E.2d 832 (1999); American Family Mut. Ins. Co. v. Northern Heritage Builders, L.L.C., 404 Ill. App. 3d 584, 344 Ill. Dec. 617, 937 N.E.2d 323 (1st Dist. 2010), appeal denied, 239 Ill. 2d 549, 348 Ill. Dec. 189, 943 N.E.2d 1099 (2011); Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007); Combined Ins. v. Shurter, 258 Neb. 958, 607 N.W.2d 492 (2000); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007); City of Union City v. Veals, 247 N.J. Super. 478, 589 A.2d 1028 (App. Div. 1991); Midland Title Sec., Inc. v. Carlson, 171 Ohio App. 3d 678, 2007-Ohio-1980, 872 N.E.2d 968 (8th Dist. Cuyahoga County 2007); Consolidated Grain & Barge Co. v. Structural Systems, Inc., 2009 OK 14, 212 P.3d 1168 (Okla. 2009); Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000); Texas Health Ins. Risk Pool v. Sigmundik, 315 S.W.3d 12 (Tex. 2010); Steffens v. BlueCross BlueShield of Illinois, 2011 WI 60, 335 Wis. 2d 514, 804 N.W.2d 196 (2011).

5 State Bar of California v. Statile, 168 Cal. App. 4th 650, 86 Cal. Rptr. 3d 72 (1st Dist. 2008); Roberts v. Total Health Care, Inc., 109 Md. App. 635, 675 A.2d 995 (1996), aff'd, 349 Md. 499, 709 A.2d 142 (1998).

6 In re Kizzee-Jordan, 626 F.3d 239 (5th Cir. 2010); State Bar of California v. Statile, 168 Cal. App. 4th 650, 86 Cal. Rptr. 3d 72 (1st Dist. 2008).

7 Phillips v. State Farm Mut. Auto. Ins. Co., 73 F.3d 1535 (10th Cir. 1996) (applying Oklahoma law and holding that the right to subrogation arises out of equity and exists independent of any statutory rights the legislature may have conferred); Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007).

8 Roberts v. Total Health Care, Inc., 109 Md. App. 635, 675 A.2d 995 (1996), aff'd, 349 Md. 499, 709 A.2d 142 (1998).

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73 Am. Jur. 2d Subrogation § 4

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I. In General

§ 4. Kinds and classifications—Conventional subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 27

Forms

Am. Jur. Legal Forms 2d §§ 205 to 207 (Subrogation agreement)
Am. Jur. Legal Forms 2d §§ 241:4 to 241:8 (Subrogation agreement)
Am. Jur. Pleading and Practice Forms, Captions, Prayers, and Formal Parts § 365 (Insurance—For insurance company's subrogation to rights of insured—For money judgment)

Conventional subrogation is contractual and is based or rests on an agreement between parties.[1] "Conventional subrogation" arises where an agreement is made that the person paying the debt will be subrogated to the rights and remedies of the original creditor.[2] In other words, "conventional subrogation," i.e., "contractual subrogation," is created by an agreement or contract between parties granting the right to pursue reimbursement from a third party in exchange for payment of a loss.[3] It is a product of bargaining between the parties.[4] This form of subrogation may be based on specific language in a contract[5] although an agreement for conventional subrogation need not be in writing and may be by way of oral or express agreement.[6] The form of the parties' agreement or contract may either be express or implied.[7] In other words, conventional subrogation arises or flows from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor.[8] This form of subrogation is found where one having no interest or any relation to a matter pays the debt of another and by agreement is entitled to the rights and securities of the creditor so paid; it can take effect only by agreement and has been said to be synonymous with an assignment.[9] Stated another way, "conventional subrogation" occurs when an obligee, who receives performance from a third party, subrogates that person to his rights even without the obligor's consent.[10]

Observation:

In distinguishing the two forms, "legal or equitable subrogation" has its source in equity and arises by operation of law while "conventional subrogation" arises through a contract by the parties.[11]

Subrogation clauses in contracts do not violate public policy;[12] however, despite the parties' contractual agreement, it will not be recognized where a statute expresses a public policy against the enforcement of those rights.[13]

Practice Tip:

Although conventional subrogation arises by way of contract, the intent to convey the right of subrogation must be clearly expressed[14] as the focus of conventional subrogation is the agreement of the parties.[15]

CUMULATIVE SUPPLEMENT

Cases:

For conventional subrogation to apply, (1) there must be an express agreement to the effect that the party paying the debt on behalf of the third party will be able to assert the rights of the original creditor, (2) the loan proceeds were used to refinance the mortgage(s) as to which the lender seeks subrogation, (3) no harm will come to an innocent third party if the lender is granted priority, and (4) there has been no gross negligence. Wilmington Savings Fund Society, FSB v. Zarkhin, 2019 IL App (2d) 180439, 429 Ill. Dec. 764, 125 N.E.3d 470 (App. Ct. 2d Dist. 2019), appeal denied, 433 Ill. Dec. 534, 132 N.E.3d 372 (Ill. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Financial Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276 (11th Cir. 2007); Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010); Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021 (2011); Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007).

Parties can agree to create a contractual right of subrogation, which is commonly done in insurance policies. American Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 2008 SD 106, 757 N.W.2d 584 (S.D. 2008).

2 Financial Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276 (11th Cir. 2007); Continental Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008).

3 Brown v. Patel, 2007 OK 16, 157 P.3d 117 (Okla. 2007); Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. 2007).

4 Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000).

5 Fire Ins. Exchange v. Thunderbird Masonry, Inc., 177 Ariz. 365, 868 P.2d 948 (Ct. App. Div. 1 1993); St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001); North American Ins. Co. v. Kemper Nat. Ins. Co., 325 Ill. App. 3d 477, 259 Ill. Dec. 448, 758 N.E.2d 856 (1st Dist. 2001); A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995); American Nursing Resources, Inc. v. Forrest T. Jones & Co., Inc., 812 S.W.2d 790 (Mo. Ct. App. W.D. 1991).

6 A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995).

7 Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C., 646 A.2d 966 (D.C. 1994); Byers v. McGuire Properties, Inc., 285 Ga. 530, 679 S.E.2d 1 (2009); Midland Title Sec., Inc. v. Carlson, 171 Ohio App. 3d 678, 2007-Ohio-1980, 872 N.E.2d 968 (8th Dist. Cuyahoga County 2007); Credit Union Cent. Falls v. Groff, 966 A.2d 1262 (R.I. 2009).

The general rule is that clear and unambiguous subrogation clauses are valid and enforceable contractual provisions. Zinader v. Copley-Fairlawn City School Dist., 95 Ohio App. 3d 623, 643 N.E.2d 172, 96 Ed. Law Rep. 246 (9th Dist. Summit County 1994).

8 Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 135 Ed. Law Rep. 268 (Fla. 1999).

9 Westchester Fire Ins. Co. v. Allstate Ins. Co., 236 Conn. 362, 672 A.2d 939 (1996).

10 Bayou Steel Corp. v. Evanston Ins. Co., 354 Fed. Appx. 9 (5th Cir. 2009); A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995).

11 Sapiano v. Williamsburg Nat. Ins. Co., 28 Cal. App. 4th 533, 33 Cal. Rptr. 2d 659 (2d Dist. 1994); North American Ins. Co. v. Kemper Nat. Ins. Co., 325 Ill. App. 3d 477, 259 Ill. Dec. 448, 758 N.E.2d 856 (1st Dist. 2001); Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co., 978 S.W.2d 754 (Ky. Ct. App. 1998).

12 Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007).

13 Capitol Indem. Corp. v. Strike Zone, 269 Ill. App. 3d 594, 206 Ill. Dec. 943, 646 N.E.2d 310 (4th Dist. 1995).

14 Durham Life Ins. Co. v. Lee, 625 So. 2d 706 (La. Ct. App. 1st Cir. 1993).

15 Blue Cross & Blue Shield Mut. of Ohio v. Hrenko, 72 Ohio St. 3d 120, 1995-Ohio-306, 647 N.E.2d 1358 (1995).

End of Document

73 Am. Jur. 2d Subrogation § 5

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§ 5. Kinds and classifications—Legal or equitable subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

A.L.R. Library

Right of Insurer to Assert Equitable Subrogation Claim Against Attorney for Insured on Grounds of Professional Malpractice, 50 A.L.R.6th 53

"Equitable" or "legal" subrogation, since it is a broad doctrine,[1] is given a liberal application;[2] the doctrine of equitable subrogation is highly favored in the law.[3] It applies where one who has discharged the debt of another may, under certain circumstances, succeed to the rights and position of the satisfied creditor if: (1) payment must have been made by the subrogee to protect his or her own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must have been one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others.[4] "Equitable subrogation" is not a matter of contract and does not arise from any contractual relationship between the parties, but rather, it takes place as a matter of equity,[5] and it arises through the legal consequences of the acts and relationships of the parties.[6] Thus, the doctrine of equitable subrogation requires no writing or agreement in most instances,[7] and since it is a creature of equity[8] and it depends upon the equities of the parties, rather than a contract, it arises by operation of law.[9] Stated another way, "equitable subrogation" includes every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter.[10]

Observation:

Equitable subrogation is based on the principle that substantial justice should be attained regardless of form, that is, its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form.[11]

CUMULATIVE SUPPLEMENT

Cases:

The definition of "equitable subrogation" is that which arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. JPMorgan Chase Bank, N.A. v. Jackson, 2014-Ohio-320, 7 N.E.3d 657 (Ohio Ct. App. 5th Dist. Licking County 2014).

[END OF SUPPLEMENT]

Footnotes

1 Gulf Ins. Co. v. TIG Ins. Co., 86 Cal. App. 4th 422, 103 Cal. Rptr. 2d 305 (2d Dist. 2001); Warning Lights and Scaffold Service, Inc. v. O and G Industries, Inc., 102 Conn. App. 267, 925 A.2d 359 (2007); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007).

2 St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007).

3 U.S. Bank Nat. Ass'n v. Hylton, 403 N.J. Super. 630, 959 A.2d 1239 (Ch. Div. 2008).
Courts are hospitable to the doctrine of equitable subrogation. Bennett Truck Transport, LLC v. Williams Bros. Const., 256 S.W.3d 730 (Tex. App. Houston 14th Dist. 2008).

4 Morgan Creek Residential v. Kemp, 153 Cal. App. 4th 675, 63 Cal. Rptr. 3d 232, 63 U.C.C. Rep. Serv. 2d 507 (3d Dist. 2007); Joondeph v. Hicks, 235 P.3d 303 (Colo. 2010); State Farm Mut. Auto. Ins. Co. v. Johnson, 18 So. 3d 1099 (Fla. 2d DCA 2009); Wilshire Servicing Corp. v. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct. App. 2001).
Classes of persons entitled to subrogation, see §§ 19 to 22.
Payments to support subrogation, generally, see §§ 23 to 28.
Goals and purposes of subrogation, see § 2.

5 Pearlman v. Reliance Ins. Co., 371 U.S. 132, 83 S. Ct. 232, 9 L. Ed. 2d 190 (1962); Warning Lights and Scaffold Service, Inc. v. O and G Industries, Inc., 102 Conn. App. 267, 925 A.2d 359 (2007); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C., 646 A.2d 966 (D.C. 1994); A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995); Youngblood v. American States Ins. Co., 262 Mont. 391, 866 P.2d 203 (1993); American Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 2008 SD 106, 757 N.W.2d 584 (S.D. 2008); Acuity v. McGhee Engineering, Inc., 297 S.W.3d 718

(Tenn. Ct. App. 2008); Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liability Ins. Plan, 200 Wis. 2d 599, 547 N.W.2d 578 (1996).

Equitable subrogation is independent of any contractual relations between the parties. National American Ins. Co. v. U.S., 498 F.3d 1301 (Fed. Cir. 2007).

Equitable subrogation has its origin in common law and equity. Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010).

6 State Farm Mut. Auto. Ins. Co. v. Johnson, 18 So. 3d 1099 (Fla. 2d DCA 2009).

7 St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001).

8 Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000); State Farm Fire and Cas. Co. v. Weiss, 194 P.3d 1063, 50 A.L.R.6th 593 (Colo. App. 2008).

9 Financial Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276 (11th Cir. 2007); Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000); Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021 (2011); Midland Title Sec., Inc. v. Carlson, 171 Ohio App. 3d 678, 2007-Ohio-1980, 872 N.E.2d 968 (8th Dist. Cuyahoga County 2007).

10 Allstate Ins. Co. v. Palumbo, 296 Conn. 253, 994 A.2d 174 (2010); Citizens Ins. Co. of America v. Buck, 216 Mich. App. 217, 548 N.W.2d 680 (1996); Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. 2007).

Equitable subrogation is based upon the premise that a person who pays a debt that is owed by another should be allowed the opportunity to be reimbursed in full by the one primarily responsible for the losses. Rink v. State, 27 Misc. 3d 1159, 901 N.Y.S.2d 480 (Ct. Cl. 2010), order aff'd, 87 A.D.3d 1372, 929 N.Y.S.2d 903 (4th Dep't 2011).

11 Acuity v. McGhee Engineering, Inc., 297 S.W.3d 718 (Tenn. Ct. App. 2008).

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§ 6. Other rights or remedies distinguished

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Subrogation is distinguishable from various other doctrines and remedies although it is also closely akin to, if not part of, the equitable principles of restitution and unjust enrichment.[1] Subrogation, in its relationship to unjust enrichment, is best thought of as a remedy, not as an independent cause of action.[2] It is comparable to other forms of restitutionary relief such as the imposition of a constructive trust, imposition of an equitable lien, all of which are available only in equity.[3] Subrogation seeks to prevent the unearned enrichment of one party at the expense of another[4] by creating a relation somewhat analogous to a constructive trust in favor of the subrogee, or party making payment, in all legal rights held by the creditor.[5]

Since subrogation effects an assignment by operation of law, it is sometimes termed an "equitable assignment,"[6] and in fact, subrogation—according to some courts—has been held to be synonymous with the law of assignment[7] although not all courts agree with this interpretation[8] and hold that assignment and subrogation remain distinct legal concepts.[9] Furthermore, subrogation differs from an ordinary assignment in that such an assignment assumes the continued existence of the debt while subrogation follows upon its payment.[10] However, regardless of whether a transfer is technically called an assignment or subrogation or equitable assignment or assignment by operation of law does not matter since its ultimate effect is the same: to pass the title to a cause of action from one person to another.[11]

Similarly, subrogation is distinguishable from certain procedural doctrines such as intervention,[12] as well as other remedies, such as specific performance,[13] and other legal doctrines, such as contribution or indemnification.[14] Subrogation differs from contribution because its operation rests on concepts of primary and secondary liability among obligors; thus, it acts to place an entire loss, not just a portion, on another party.[15]

Observation:

"Subrogation" and "reimbursement" are different in principle although similar in effect; with subrogation, an insurer stands in the shoes of the insured, but with reimbursement, the insurer has a direct right of repayment against the insured.[16]

Footnotes

1 Western Cas. & Sur. Co. v. Meyer, 301 Ky. 487, 192 S.W.2d 388, 164 A.L.R. 769 (1946); G.E. Capital Mortg. Services, Inc. v. Levenson, 338 Md. 227, 657 A.2d 1170 (1995).
Restitution and unjust enrichment, generally, see Am. Jur. 2d, Restitution and Implied Contracts §§ 1 to 3.

2 Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007).

3 Clark v. Teeven Holding Co., Inc., 625 A.2d 869 (Del. Ch. 1992); G.E. Capital Mortg. Services, Inc. v. Levenson, 338 Md. 227, 657 A.2d 1170 (1995).

4 Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962); Detroit Steel Products Co. v. Hudes, 17 Ill. App. 2d 514, 151 N.E.2d 136 (4th Dist. 1958); G.E. Capital Mortg. Services, Inc. v. Levenson, 338 Md. 227, 657 A.2d 1170 (1995); D'Angelo v. Cornell Paperboard Products Co., 19 Wis. 2d 390, 120 N.W.2d 70 (1963).

5 Detroit Steel Products Co. v. Hudes, 17 Ill. App. 2d 514, 151 N.E.2d 136 (4th Dist. 1958).

6 Des Moines Furnace & Stove Repair Co. v. Lemon, 244 Iowa 316, 56 N.W.2d 923 (1953); Hustad v. Reed, 133 Mont. 211, 321 P.2d 1083 (1958); D'Angelo v. Cornell Paperboard Products Co., 19 Wis. 2d 390, 120 N.W.2d 70 (1963).
Definitions of types of assignments, see Am. Jur. 2d, Assignments §§ 1 to 6.

7 Rohner, Gehrig & Co. v. Capital City Bank, 655 F.2d 571, 32 U.C.C. Rep. Serv. 231 (5th Cir. 1981) (applying New York law); Westchester Fire Ins. Co. v. Allstate Ins. Co., 236 Conn. 362, 672 A.2d 939 (1996); U.S. Inv. and Development Corp. v. Rhode Island Dept. of Human Services, 606 A.2d 1314 (R.I. 1992); Stilson v. Hodges, 934 P.2d 736 (Wyo. 1997).

8 Money Store/Massachusetts, Inc. v. Hingham Mut. Fire Ins. Co., 430 Mass. 298, 718 N.E.2d 840 (1999) (holding that subrogation and assignment are not the functional equivalent of each other; the former speaks in terms of broader equitable rights and remedies whereas the latter is legal in nature).

9 Continental Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008).

10 Bank of Fort Mill v. Lawyers Title Ins. Corp., 268 F.2d 313 (4th Cir. 1959); Kansas City Title & Trust Co. v. Fourth Nat. Bank in Wichita, Kan., 135 Kan. 414, 10 P.2d 896, 87 A.L.R. 334 (1932).

11 Fifield Manor v. Finston, 54 Cal. 2d 632, 7 Cal. Rptr. 377, 354 P.2d 1073, 78 A.L.R.2d 813 (1960).

12 Mississippi Food and Fuel Workers' Compensation Trust v. Tackett, 778 So. 2d 136 (Miss. Ct. App. 2000) (holding subrogation is a substantive right protected under the law whereas intervention is merely a procedural means by which that substantive right is protected).

13 Kirwan v. Chicago Title Ins. Co., 9 Neb. App. 372, 612 N.W.2d 515 (2000), aff'd in part, rev'd in part on other grounds, 261 Neb. 609, 624 N.W.2d 644 (2001).
Definition of specific performance, see Am. Jur. 2d, Specific Performance § 1.

14 Crowley Maritime Corp. v. Boston Old Colony Ins. Co., 158 Cal. App. 4th 1061, 70 Cal. Rptr. 3d 605 (1st Dist. 2008) (although the concepts of "contribution" and "subrogation" are both equitable in nature, they are

nevertheless distinct); Enterprise Leasing Co. of St. Louis v. Hardin, 353 Ill. Dec. 931, 956 N.E.2d 1059 (App. Ct. 5th Dist. 2011); Hawkins v. Gadoury, 713 A.2d 799 (R.I. 1998).

Definition of contribution, see Am. Jur. 2d, Contribution § 1.

Definition of indemnity, see Am. Jur. 2d, Indemnity § 1.

15 Levy v. HLI Operating Co., Inc., 924 A.2d 210 (Del. Ch. 2007).

16 A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995).

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§ 7. Flexibility and scope

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 2

Subrogation, as a doctrine, is not fixed and inflexible[1] nor is it static, but rather, it is sufficiently elastic to meet the ends of justice.[2] Furthermore, the doctrine is not constrained by form over substance,[3] nor is it within the form of a rigid rule of law.[4] Thus, the mere fact that the doctrine has not been previously invoked in a particular situation is not a prima facie bar to its applicability.[5]

The doctrine of subrogation embraces all cases where, without it, complete justice cannot be done.[6] Grounded upon this premise, there is no limit to the circumstances that may arise in which the doctrine may be applied,[7] particularly if applying the doctrine will provide the most efficient and complete remedy which can be afforded.[8]

Caution:

Although some courts see subrogation as a flexible remedy, not all courts agree, and in fact, some courts hold that subrogation is a fairly drastic remedy, usually allowed only in extreme cases bordering on, if not reaching, the level of fraud.[9]

Footnotes

1 U.S. v. Continental Casualty Co., 512 F.2d 475 (5th Cir. 1975); In re Air Crash Disaster, 86 F.3d 498, 44 Fed. R. Evid. Serv. 1102, 34 Fed. R. Serv. 3d 1067, 1996 FED App. 0157P (6th Cir. 1996); Employers Ins. of Wausau v. James McHugh Const. Co., 144 F.3d 1097 (7th Cir. 1998); Mort v. U.S., 86 F.3d 890 (9th Cir. 1996); Hartford Acc. & Indem. Co. v. Used Car Factory, Inc., 461 Mich. 210, 600 N.W.2d 630 (1999); Adamson v. Chiovaro, 308 N.J. Super. 70, 705 A.2d 402 (App. Div. 1998); Berendes v. Berendes, 385 N.W.2d 119 (S.D. 1986).

2 In re Air Crash Disaster, 86 F.3d 498, 44 Fed. R. Evid. Serv. 1102, 34 Fed. R. Serv. 3d 1067, 1996 FED App. 0157P (6th Cir. 1996); Employers Ins. of Wausau v. James McHugh Const. Co., 144 F.3d 1097 (7th Cir. 1998); Hartford Acc. & Indem. Co. v. Used Car Factory, Inc., 461 Mich. 210, 600 N.W.2d 630 (1999); Adamson v. Chiovaro, 308 N.J. Super. 70, 705 A.2d 402 (App. Div. 1998); Argonaut Ins. Co. v. Allstate Ins. Co., 869 S.W.2d 537 (Tex. App. Corpus Christi 1993), writ denied, (June 8, 1994).

3 Cozzetto v. Wisman, 120 Idaho 721, 819 P.2d 575 (Ct. App. 1991); American Nursing Resources, Inc. v. Forrest T. Jones & Co., Inc., 812 S.W.2d 790 (Mo. Ct. App. W.D. 1991); Rice-Bell Partnership v. Capitol Indem. Corp., 2000 OK CIV APP 71, 8 P.3d 189 (Div. 2 2000).

4 Employers Ins. of Wausau v. James McHugh Const. Co., 144 F.3d 1097 (7th Cir. 1998); Rice-Bell Partnership v. Capitol Indem. Corp., 2000 OK CIV APP 71, 8 P.3d 189 (Div. 2 2000).

5 Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000) (applying Illinois law); Smith v. Clavey Ravinia Nurseries, 329 Ill. App. 548, 69 N.E.2d 921 (2d Dist. 1946); Neal v. Neal, 219 Mich. App. 490, 557 N.W.2d 133 (1996).

6 In re Kemmerrer, 114 Cal. App. 2d 810, 251 P.2d 345, 35 A.L.R.2d 1393 (2d Dist. 1952).

7 Fenly v. Revell, 170 Kan. 705, 228 P.2d 905 (1951); Wyoming Building & Loan Ass'n v. Mills Const. Co., 38 Wyo. 515, 269 P. 45, 60 A.L.R. 418 (1928).

8 Anderson v. Stockwell, 130 Kan. 103, 285 P. 526 (1930); Maryland Cas. Co. v. King, 1963 OK 95, 381 P.2d 153 (Okla. 1963); Dixon v. Morgan, 154 Tenn. 389, 285 S.W. 558 (1926).

9 Metmor Financial, Inc. v. Landoll Corp., 976 S.W.2d 454 (Mo. Ct. App. W.D. 1998), retransferred to Mo. Ct. of Appeals, (Oct. 20, 1998) and opinion adopted and reinstated after retransfer, (Oct. 26, 1998).

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§ 8. Doctrine as favored

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Subrogation is a highly favored doctrine in the law[1] which is to be given a liberal application[2] and which the courts are inclined to extend rather than to restrict.[3] In fact, some courts encourage its application.[4]

Footnotes

1 Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991); Allstate Ins. Co. v. Palumbo, 296 Conn. 253, 994 A.2d 174 (2010); Smith v. Clavey Ravinia Nurseries, 329 Ill. App. 548, 69 N.E.2d 921 (2d Dist. 1946); Wilshire Servicing Corp. v. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct. App. 2001); Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010); 3105 Grand Corporation v. City of New York, 288 N.Y. 178, 42 N.E.2d 475, 141 A.L.R. 1211 (1942); Mahler v. Szucs, 135 Wash. 2d 398, 957 P.2d 632 (1998), order corrected on denial of reconsideration, 966 P.2d 305 (Wash. 1998); Jindra v. Diederich Flooring, 181 Wis. 2d 579, 511 N.W.2d 855 (1994).

2 Wilshire Servicing Corp. v. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct. App. 2001); D'Angelo v. Cornell Paperboard Products Co., 19 Wis. 2d 390, 120 N.W.2d 70 (1963).

3 Westchester Fire Ins. Co. v. Allstate Ins. Co., 236 Conn. 362, 672 A.2d 939 (1996); First Nat. Bank of Atlanta v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402 (1944); Menorah Nursing Home, Inc. v. Zukov, 153 A.D.2d 13, 548 N.Y.S.2d 702 (2d Dep't 1989).

4 In re Estate of Scott, 208 Ill. App. 3d 846, 153 Ill. Dec. 647, 567 N.E.2d 605 (2d Dist. 1991).

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§ 9. Governing law

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West's Key Number Digest

West's Key Number Digest, Subrogation 1

A.L.R. Library

Comment Note.—What law governs as to proper party plaintiff in contract action, 62 A.L.R.2d 486

In some jurisdictions, the applicable law of subrogation is that of the place of contract.[1] In other cases, it is a question of procedure and governed by the law of the forum.[2] Other courts have enforced choice of law provisions pertaining to subrogation rights which are found in the contract from which the rights arose.[3] Finally, a subrogation claim arising from a tort is properly characterized as a tort claim for choice of law purposes;[4] courts may apply different rules where the underlying claim which gives way to the subrogation action is a tort claim[5] where, for example, the place of the accident may govern which jurisdiction's law applies.[6]

Practice Tip:

In terms of the factors that courts look at in matters involving choice of law in subrogation cases, the courts consider: (1) the predictability of results (i.e., the avoidance of forum shopping); (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law.[7]

Footnotes

1 Reconstruction Finance Corp. v. Maryland Cas. Co., 23 F. Supp. 1008 (D. Md. 1938); Lincoln Nat. Health and Cas. Ins. Co. v. Mitsubishi Motor Sales of America, Inc., 666 So. 2d 159 (Fla. 5th DCA 1995).

2 Aetna Freight Lines, Inc. v. R. C. Tway Co., 298 S.W.2d 293, 62 A.L.R.2d 480 (Ky. 1956).

3 Javed v. British Airways PLC, 980 F.2d 1407 (11th Cir. 1993).

4 Dictor v. Creative Management Services, LLC, 223 P.3d 332, 126 Nev. Adv. Op. No. 4 (Nev. 2010).

5 Lincoln Nat. Health and Cas. Ins. Co. v. Mitsubishi Motor Sales of America, Inc., 666 So. 2d 159 (Fla. 5th DCA 1995); Thomas v. Cook Drilling Corp., 79 Ohio St. 3d 547, 1997-Ohio-365, 684 N.E.2d 75 (1997) (relating to an insurer's motion to intervene into a wrongful death action).

6 Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co., 604 N.W.2d 91 (Minn. 2000).

7 Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co., 604 N.W.2d 91 (Minn. 2000).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 2, 27

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 1, 2, 27

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 10. Basic elements of subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

There is no general rule to determine whether a right of subrogation exists.[1] Thus, ordering subrogation depends on the equities and attending facts and circumstances of each case.[2]

There are certain elements or conditions which must be present in every case in which legal subrogation is sought, such as a debt or obligation for which parties other than the subrogee are primarily liable and which he as surety, guarantor, or in some other capacity discharges for the protection of his own rights or interests.[3] However, dependent upon whether a party is seeking either conventional subrogation or legal or equitable subrogation, there may be different equitable considerations.[4] It has been held that common law or equitable subrogation cannot stand in the face of an express contractual right of subrogation.[5]

Observation:

Generally speaking, the elements of subrogation are as follows: (1) a party pays in full a debt or an obligation of another or removes an encumbrance of another, (2) for which the other is primarily liable, (3) although the party is not technically bound to do so, (4) in order to protect his own secondary rights, to fulfill a contractual obligation, or to comply with the request of the original debtor, (5) without acting as a volunteer or an intermeddler.[6]

Footnotes

1 Allstate Ins. Co. v. Palumbo, 296 Conn. 253, 994 A.2d 174 (2010); Dix Mut. Ins. Co. v. LaFramboise, 149 Ill. 2d 314, 173 Ill. Dec. 648, 597 N.E.2d 622 (1992) (rejected on other grounds by, Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007)); Nebraska Beef, Ltd. v. Universal Sur. Co., 9 Neb. App. 40, 607 N.W.2d 227 (2000).

2 Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962); Ryder v. State Farm Mut. Auto. Ins. Co., 371 Ark. 508, 268 S.W.3d 298 (2007); JPMorgan Chase Bank v. Howell, 883 N.E.2d 106 (Ind. Ct. App. 2007); Hartford Acc. & Indem. Co. v. Used Car Factory, Inc., 461 Mich. 210, 600 N.W.2d 630 (1999); ABN AMRO Mtge. Group v. Kangah, 126 Ohio St. 3d 425, 2010-Ohio-3779, 934 N.E.2d 924 (2010); Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007); Beacon Bowl, Inc. v. Wisconsin Elec. Power Co., 176 Wis. 2d 740, 501 N.W.2d 788 (1993).

3 American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 314 U.S. 314, 62 S. Ct. 226, 86 L. Ed. 241, 138 A.L.R. 509 (1941); Grant v. De Otte, 122 Cal. App. 2d 724, 265 P.2d 952 (4th Dist. 1954); Security Ins. Co. of New Haven-The Connecticut Indem. Co. v. Mangan, 250 Md. 241, 242 A.2d 482, 5 U.C.C. Rep. Serv. 621 (1968); George L. Schnader, Jr., Inc. v. Cole Bldg. Co., 236 Md. 17, 202 A.2d 326 (1964).

Sureties and guarantors, generally, see §§ 38 to 42.

4 National Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C., 646 A.2d 966 (D.C. 1994) (holding superior equities doctrine, under which equities of parties seeking subrogation must be greater than those of his adversary, applies only to equitable subrogation claims and has no application in cases of conventional subrogation); Mellon Bank, N.A. v. National Union Ins. Co. of Pittsburgh, PA, 2001 PA Super 32, 768 A.2d 865 (2001).

5 American Family Mut. Ins. Co. v. Northern Heritage Builders, L.L.C., 404 Ill. App. 3d 584, 344 Ill. Dec. 617, 937 N.E.2d 323 (1st Dist. 2010), appeal denied, 239 Ill. 2d 549, 348 Ill. Dec. 189, 943 N.E.2d 1099 (2011).

Application of equitable principles in face of contractual subrogation, see § 11.

6 St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001); Golden Eagle Ins. Co. v. First Nationwide Financial Corp., 26 Cal. App. 4th 160, 31 Cal. Rptr. 2d 815 (1st Dist. 1994); Hollywood Lakes Country Club, Inc. v. Community Ass'n Services, Inc., 770 So. 2d 716 (Fla. 4th DCA 2000); Hoopes v. Hoopes, 124 Idaho 518, 861 P.2d 88 (Ct. App. 1993); Wine v. Globe American Cas. Co., 917 S.W.2d 558 (Ky. 1996); Pulte Home Corp. v. Parex, Inc., 174 Md. App. 681, 923 A.2d 971 (2007), judgment aff'd, 403 Md. 367, 942 A.2d 722, 65 U.C.C. Rep. Serv. 2d 430 (2008); Credit Union Cent. Falls v. Groff, 966 A.2d 1262 (R.I. 2009); Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000).

Payments to support right to subrogation, generally, see §§ 23 to 28.

Classes of persons entitled to subrogation, generally, see §§ 19 to 22.

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 11. Principles of equity and justice as controlling

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 27

Subrogation has its roots in natural justice[1] and is an equitable remedy.[2] Thus, subrogation is governed by principles of equity;[3] subrogation is a doctrine steeped in equity,[4] and it is an equitable doctrine.[5] Subrogation is not a matter of right, and it is based upon equitable principles.[6] Since it is the object of subrogation to do complete and perfect justice between the parties without regard to form or technicality,[7] the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy.[8] The fact that the right to subrogation stems from a contract does not render equitable considerations irrelevant;[9] the parties to a contract cannot by their agreement control which principles of equity which govern subrogation as to a claim against a third party.[10] However, it has also been held that where the right of subrogation is created by the terms of an enforceable contract, the contract terms control rather than common law or equitable principles.[11]

Relief by way of subrogation will not be granted where it would work injustice,[12] or where innocent persons would suffer,[13] or where the result would be inimical to public policy.[14]

Observation:

Subrogation is an equitable remedy that rests upon principles of unjust enrichment and attempts to accomplish complete and perfect justice among the parties.[15] The remedy further seeks to prevent or prohibit the subrogee from recouping or receiving any windfall.[16] The test as to whether a party has right to maintain action for subrogation involves a consideration of, and must necessarily depend upon, the respective equities of parties.[17]

CUMULATIVE SUPPLEMENT

Cases:

Under Washington law, "subrogation" is an equitable doctrine extending to parties who, although not personally bound to pay a debt, are compelled to do so in order to protect their property interest. In re Residential Capital, LLC, 531 B.R. 1 (Bankr. S.D. N.Y. 2015).

The doctrine of subrogation does not rest on contract, but upon principles of natural equity; accordingly, although certain factors may weigh more heavily for or against subrogation, ultimately it is awarded only after carefully weighing all of the facts and circumstances and deciding what the fairest result would be. Community Trust Bank of Mississippi v. First Nat. Bank of Clarksdale, 150 So. 3d 683 (Miss. 2014).

[END OF SUPPLEMENT]

Footnotes

1 Shumpert v. Time Ins. Co., 329 S.C. 605, 496 S.E.2d 653 (Ct. App. 1998).

2 American Family Mut. Ins. Co. v. DeWitt, 218 P.3d 318 (Colo. 2009); Bank of America, N.A. v. Ping, 879 N.E.2d 665 (Ind. Ct. App. 2008); Budget Rent-a-Car Systems, Inc. v. Bridgestone, 145 N.M. 623, 2009-NMCA-013, 203 P.3d 154 (Ct. App. 2008); First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC, 161 Wash. App. 474, 254 P.3d 835 (Div. 1 2011).

3 Equistar Chemicals, LP v. Hartford Steam Boiler Inspection and Ins. Co. of Connecticut, 379 Ill. App. 3d 771, 318 Ill. Dec. 509, 883 N.E.2d 740 (4th Dist. 2008); Wimer v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 627, 939 A.2d 843 (2007); Muller v. Society Ins., 2008 WI 50, 309 Wis. 2d 410, 750 N.W.2d 1 (2008).

4 Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000); Nappi v. Nappi Distributors, 1997 ME 54, 691 A.2d 1198 (Me. 1997).

5 In re Brady, 234 B.R. 652 (Bankr. E.D. Pa. 1999), order aff'd, 243 B.R. 253 (E.D. Pa. 2000); St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001); Hoopes v. Hoopes, 124 Idaho 518, 861 P.2d 88 (Ct. App. 1993); Erie Ins. Co. v. George, 681 N.E.2d 183 (Ind. 1997); United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995); Riemer v. Columbia Medical Plan, Inc., 358 Md. 222, 747 A.2d 677 (2000); Blue Cross and Blue Shield of Montana, Inc. v. Montana State Auditor, 2009 MT 318, 352 Mont. 423, 218 P.3d 475 (2009); Benedictine Hosp. v. Glessing, 90 A.D.3d 1383, 935 N.Y.S.2d 683 (3d Dep't 2011); In re Declaratory Ruling by North Carolina Com'r of Ins. Regarding 11 N.C.A.C. 12.0319, 134 N.C. App. 22, 517 S.E.2d 134 (1999); First State Bank & Trust Co. of Shawnee v. Wholesale Enterprises, Inc., 1994 OK CIV APP 137, 883 P.2d 207, 25 U.C.C. Rep. Serv. 2d 677 (Ct. App. Div. 1 1994); Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc., 2007 PA Super 13, 916 A.2d 686 (2007); Community Ass'n Underwriters of America, Inc. v. Kalles, 164 Wash. App. 30, 259 P.3d 1154 (Div. 2 2011); Beacon Bowl, Inc. v. Wisconsin Elec. Power Co., 176 Wis. 2d 740, 501 N.W.2d 788 (1993).

6 St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001); Publix Cab Co. v. Colorado Nat. Bank of Denver, 139 Colo. 205, 338 P.2d 702, 78 A.L.R.2d 198 (1959); Hoopes v. Hoopes,

124 Idaho 518, 861 P.2d 88 (Ct. App. 1993); Share Health Plan, Inc. v. Marcotte, 495 N.W.2d 1 (Minn. Ct. App. 1993); Dairyland Ins. Co. v. Herman, 1998-NMSC-005, 124 N.M. 624, 954 P.2d 56 (1997); Chemical Bank v. Meltzer, 93 N.Y.2d 296, 690 N.Y.S.2d 489, 712 N.E.2d 656 (1999); School Dist. of Borough of Aliquippa v. Maryland Cas. Co., 402 Pa. Super. 569, 587 A.2d 765, 66 Ed. Law Rep. 683 (1991); Osborne v. Jauregui, Inc., 252 S.W.3d 70 (Tex. App. Austin 2008); Muller v. Society Ins., 2008 WI 50, 309 Wis. 2d 410, 750 N.W.2d 1 (2008).

7 Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams, 769 So. 2d 484 (Fla. 4th DCA 2000); Dix Mut. Ins. Co. v. LaFramboise, 149 Ill. 2d 314, 173 Ill. Dec. 648, 597 N.E.2d 622 (1992) (rejected on other grounds by, Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007)).

The doctrine of subrogation is enforced to bring about substantial justice. Wimer v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 627, 939 A.2d 843 (2007).

8 Calvert Fire Ins. Co. v. James, 236 S.C. 431, 114 S.E.2d 832, 92 A.L.R.2d 97 (1960).

9 Valora v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 574, 939 A.2d 312 (2007).

10 Village of Ridgewood v. Shell Oil Co., 289 N.J. Super. 181, 673 A.2d 300 (App. Div. 1996).

Contractual subrogation as displacing equitable subrogation, see § 10.

11 American Family Mut. Ins. Co. v. Northern Heritage Builders, L.L.C., 404 Ill. App. 3d 584, 344 Ill. Dec. 617, 937 N.E.2d 323 (1st Dist. 2010), appeal denied, 239 Ill. 2d 549, 348 Ill. Dec. 189, 943 N.E.2d 1099 (2011).

Contractual subrogation rights generally arise from contract language; they do not derive their validity from principles of equity. Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007).

12 In re Deuel, 594 F.3d 1073 (9th Cir. 2010), cert. denied, 131 S. Ct. 85, 178 L. Ed. 2d 27 (2010); Velazquez v. Serrano, 43 So. 3d 82 (Fla. 3d DCA 2010); Hoopes v. Hoopes, 124 Idaho 518, 861 P.2d 88 (Ct. App. 1993); Dix Mut. Ins. Co. v. LaFramboise, 149 Ill. 2d 314, 173 Ill. Dec. 648, 597 N.E.2d 622 (1992) (rejected on other grounds by, Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007)); Wine v. Globe American Cas. Co., 917 S.W.2d 558 (Ky. 1996); United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995).

13 Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991); LaSalle Bank, N.I. v. First American Bank, 316 Ill. App. 3d 515, 249 Ill. Dec. 425, 736 N.E.2d 619 (1st Dist. 2000).

14 Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962); Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991); In re Estate of Scott, 208 Ill. App. 3d 846, 153 Ill. Dec. 647, 567 N.E.2d 605 (2d Dist. 1991); Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson, 250 Kan. 490, 827 P.2d 758 (1992).

15 St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 343 Ark. 351, 37 S.W.3d 180 (2001); Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc., 919 P.2d 879 (Colo. App. 1996); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat. Bank of Washington, D.C., 646 A.2d 966 (D.C. 1994); Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams, 769 So. 2d 484 (Fla. 4th DCA 2000); Bankers Trust Co. v. Hardy, 281 Ga. 561, 640 S.E.2d 18 (2007); Cozzetto v. Wisman, 120 Idaho 721, 819 P.2d 575 (Ct. App. 1991); Lumbermens Mut. Cas. Co. v. State, Dept. of Revenue and Finance, 564 N.W.2d 431 (Iowa 1997); Riemer v. Columbia Medical Plan, Inc., 358 Md. 222, 747 A.2d 677 (2000).

Subrogation is also a remedy invoked by courts to prevent unjust enrichment, and for this purpose, it is appropriate in any case where restitution is warranted, and the remedy can be given without working injustice. Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007).

16 Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 258 P.3d 281 (Ct. App. Div. 1 2011), review granted, (Nov. 29, 2011) and opinion aff'd, 2012 WL 1138251 (Ariz. 2012); Mid-Century Ins. Co. v. Travelers Indem. Co. of Illinois, 982 P.2d 310 (Colo. 1999); Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams, 769 So. 2d 484 (Fla. 4th DCA 2000); JPMorgan Chase Bank v. Howell, 883 N.E.2d 106 (Ind. Ct. App. 2007); Deffenbaugh Industries, Inc. v. Wilcox, 28 Kan. App. 2d 19, 11 P.3d 98 (2000); Share Health Plan, Inc. v. Marcotte, 495 N.W.2d 1 (Minn. Ct. App. 1993); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007); First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC, 161 Wash. App. 474, 254 P.3d 835 (Div. 1 2011).

By paying a debt that rightfully belongs to another, the subrogee has created a windfall for the debtor; subrogation allows the subrogee to pursue that amount against the rightful debtor, thus eliminating any unjust transfer of responsibility for the debt. American Family Mut. Ins. Co. v. DeWitt, 218 P.3d 318 (Colo. 2009).

17 Reliance Nat. Indem. Co. v. General Star Indem. Co., 72 Cal. App. 4th 1063, 85 Cal. Rptr. 2d 627 (2d Dist. 1999).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 12. Application of equity maxims

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Since subrogation is a creature of chancery,[1] the various maxims of equity apply in the case of subrogation, such as the maxim that "no one shall be enriched by another's loss."[2] Where one of two innocent persons must suffer a loss, the one whose fault causes the exigency must in general bear the loss.[3] Moreover, one seeking equity must come into equity with clean hands.[4] Furthermore, subrogation will not be applied where it would be inequitable to do so, where it would work injustice to others having equal equities, or where it would operate to defeat lawful rights of another.[5] Additionally, for subrogation to apply, the equities of the party seeking to be subrogated must be superior to those of other claimants.[6]

Footnotes

1 Aames Capital Corp. v. Interstate Bank of Oak Forest, 315 Ill. App. 3d 700, 248 Ill. Dec. 565, 734 N.E.2d 493 (2d Dist. 2000); Riemer v. Columbia Medical Plan, Inc., 358 Md. 222, 747 A.2d 677 (2000).

2 Radison Properties, Inc. v. Flamingo Groves, Inc., 767 So. 2d 587 (Fla. 4th DCA 2000); Dix Mut. Ins. Co. v. LaFramboise, 149 Ill. 2d 314, 173 Ill. Dec. 648, 597 N.E.2d 622 (1992) (rejected on other grounds by, Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007)).

3 Gray v. Jacobsen, 13 F.2d 959, 48 A.L.R. 583 (App. D.C. 1926); Dix Mut. Ins. Co. v. LaFramboise, 149 Ill. 2d 314, 173 Ill. Dec. 648, 597 N.E.2d 622 (1992) (rejected on other grounds by, Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007)).

4 In re Canion, 196 F.3d 579 (5th Cir. 1999) (applying Texas law); Schuessler v. Shelnutt, 233 Ala. 188, 171 So. 259 (1936); Schaeffer v. Sterling, 176 Md. 553, 6 A.2d 254 (1939).

5 In re Brady, 234 B.R. 652 (Bankr. E.D. Pa. 1999), order aff'd, 243 B.R. 253 (E.D. Pa. 2000).

6 In re Brady, 234 B.R. 652 (Bankr. E.D. Pa. 1999), order aff'd, 243 B.R. 253 (E.D. Pa. 2000).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 13. Right or equity of claimant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

One who asserts a right of subrogation must first show a right in equity to be entitled to such subrogation.[1] Where the equities of the party asking for subrogation are greater than those of his adversary, the remedy should be ordered.[2] Thus, the person seeking subrogation must have a strong and clear right,[3] and at the very least, it must be readily apparent.[4] Furthermore, a determinative factor in assessing whether a party presents a valid claim of subrogation is whether that party (the payor) acted in good faith in seeking to protect its interests.[5]

Footnotes

1 Dobbas v. Vitas, 191 Cal. App. 4th 1442, 119 Cal. Rptr. 3d 798 (3d Dist. 2011), as modified on denial of reh'g, (Feb. 1, 2011).

2 St. Paul Fire and Marine Ins. Co. v. Michigan Nat. Bank of Detroit, 660 F.2d 196 (6th Cir. 1981) (noting that a claimant must show superior equities before he can recover); Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991); Johnny's Seafood Co. v. City of Tacoma, 73 Wash. App. 415, 869 P.2d 1097 (Div. 2 1994). A person seeking subrogation must have superior equity over the other party. Zurich American Ins. Co. v. Wisconsin Physicians Services Ins. Corp., 306 Wis. 2d 617, 2007 WI App 259, 743 N.W.2d 710 (Ct. App. 2007).

3 Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991); ABN AMRO Mtge. Group v. Kangah, 126 Ohio St. 3d 425, 2010-Ohio-3779, 934 N.E.2d 924 (2010); State ex rel. State Auto Mut. Ins. Co. v. Steptoe, 190 W. Va. 262, 438 S.E.2d 54 (1993).

4 State Sav. Bank v. Gunther, 127 Ohio App. 3d 338, 713 N.E.2d 7 (3d Dist. Union County 1998); Norfolk & Dedham Fire Ins. Co. v. Aetna Cas. & Sur. Co., 132 Vt. 341, 318 A.2d 659 (1974); State ex rel. Allstate Ins. Co. v. Karl, 190 W. Va. 176, 437 S.E.2d 749 (1993).

5 North Carolina Ins. Guar. Ass'n v. Century Indem. Co., 115 N.C. App. 175, 444 S.E.2d 464 (1994).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 14. Weighing or balancing equities or rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 2

As in other cases of equitable relief, the court in administering subrogation will weigh and balance the equities of the parties[1] as the right to subrogation is not absolute but, rather, depends upon the equities and attending facts of each case.[2] Subrogation is not appropriate in every circumstance[3] and equitable subrogation will not be enforced where the equities are equal, or the rights are not clear.[4] The courts also give due regard to the legal and equitable rights of others.[5] Thus, subrogation will not be enforced to the prejudice of other rights of equal or higher rank,[6] or displace an intervening right or title,[7] or be used to overthrow the equity of another person.[8]

In terms of the factors that courts look to in exercising their discretion and awarding subrogation, they consider whether the party requesting equitable relief engages in commercial transactions for consideration.[9] Additionally, the courts will ask whether the party seeking subrogation could pursue such claims under another theory such as contribution and whether there is another remedy at law which is as efficient as the equitable remedy of subrogation.[10]

Footnotes

1 Hoopes v. Hoopes, 124 Idaho 518, 861 P.2d 88 (Ct. App. 1993); Capitol Indem. Corp. v. Strike Zone, 269 Ill. App. 3d 594, 206 Ill. Dec. 943, 646 N.E.2d 310 (4th Dist. 1995); Employers Mut. Liability Ins. Co. of Wis. v. Griffin Const. Co., 280 S.W.2d 179, 53 A.L.R.2d 967 (Ky. 1955); United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995); Unity Tel. Co. v. Design Service Co., 160 Me. 188, 201 A.2d 177 (1964).

2 National Union Fire Ins. Co. of Pittsburgh, Pa. v. KPMG Peat Marwick, 742 So. 2d 328 (Fla. 3d DCA 1999), decision approved, 765 So. 2d 36 (Fla. 2000); Osterman v. Baber, 714 N.E.2d 735 (Ind. Ct. App. 1999);

Watters v. State, Dept. of Transp. and Development, 768 So. 2d 733 (La. Ct. App. 2d Cir. 2000); Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010); First Union Nat. Bank of North Carolina v. Lindley Laboratories, Inc., 132 N.C. App. 129, 510 S.E.2d 187 (1999).

There is no inherent right to subrogation. Performance Food Group, Inc. v. Williams, 300 Ga. App. 831, 686 S.E.2d 437 (2009).

3 Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883 (Tenn. Ct. App. 2007).

4 Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010); Acuity v. McGhee Engineering, Inc., 297 S.W.3d 718 (Tenn. Ct. App. 2008).

5 United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995); Enright v. Lehmann, 735 N.W.2d 326 (Minn. 2007); United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994); Acuity v. McGhee Engineering, Inc., 297 S.W.3d 718 (Tenn. Ct. App. 2008).

6 United States Fidelity & Guaranty Co. v. First Nat. Bank, 224 Ala. 375, 140 So. 755 (1932); United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995); Enright v. Lehmann, 735 N.W.2d 326 (Minn. 2007).

7 United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995); First Union Nat. Bank of North Carolina v. Lindley Laboratories, Inc., 132 N.C. App. 129, 510 S.E.2d 187 (1999); Germo v. Zion's Ben. Bldg. Soc., 85 Utah 227, 39 P.2d 312 (1934).

8 Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962); Motor Vehicle Sec. Fund v. All Coverage Underwriters, Inc., 22 Md. App. 586, 325 A.2d 115 (1974); United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994); Graham v. Raabe, 62 Wash. 2d 753, 384 P.2d 629 (1963).

9 Wilshire Servicing Corp. v. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct. App. 2001).

10 Village of Ridgewood v. Shell Oil Co., 289 N.J. Super. 181, 673 A.2d 300 (App. Div. 1996).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 15. Subrogation as matter of right or discretion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Subrogation is to be carried out in the exercise of proper equitable discretion.[1] However, subrogation is not an absolute right which a party paying the debt of another may enforce at will.[2]

Footnotes

1 American Sterling Bank v. Johnny Management LV, Inc., 245 P.3d 535, 126 Nev. Adv. Op. No. 41 (Nev. 2010); Del E. Webb Hotel Co. v. Bentley, 8 Ariz. App. 408, 446 P.2d 687 (1968); Allstate Ins. Co. v. Palumbo, 296 Conn. 253, 994 A.2d 174 (2010); Cozzetto v. Wisman, 120 Idaho 721, 819 P.2d 575 (Ct. App. 1991); Western Cas. & Sur. Co. v. Meyer, 301 Ky. 487, 192 S.W.2d 388, 164 A.L.R. 769 (1946); U.S. Bank Nat. Ass'n v. Hylton, 403 N.J. Super. 630, 959 A.2d 1239 (Ch. Div. 2008); Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 16 A.L.R.2d 1261 (1950).

2 Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams, 769 So. 2d 484 (Fla. 4th DCA 2000); Equitable Life Assur. Soc. of U.S. v. Person, 135 Neb. 800, 284 N.W. 260 (1939); Standard Acc. Ins. Co. v. Pellecchia, 15 N.J. 162, 104 A.2d 288 (1954).

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73 Am. Jur. 2d Subrogation § 16

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 16. Wrong as bar

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Equitable relief is generally withheld from those who are themselves guilty of wrongful or inequitable conduct or in favor of a wrongdoer.[1] In other words, the one asserting the right to subrogation cannot profit from his own wrong; he must, himself, be without fault.[2]

Footnotes

1 People v. Metropolitan Cas. Ins. Co. of N. Y., 339 Ill. App. 514, 90 N.E.2d 565 (1st Dist. 1950).

2 Hocker v. New Hampshire Ins. Co., 922 F.2d 1476 (10th Cir. 1991); Village of Ridgewood v. Shell Oil Co., 289 N.J. Super. 181, 673 A.2d 300 (App. Div. 1996).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 17. Neglect as bar

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

One charged with culpable negligence may not be entitled to equitable subrogation.[1] One asserting a right to subrogation cannot thereby profit from his own inaction.[2] However, something more than simple negligence is required to defeat his right to subrogation.[3] Ordinary negligence may be taken into consideration in determining whether the negligent party is entitled to subrogation, but ordinary negligence alone is not a complete bar to subrogation where, in spite of such negligence, the equities are still in favor of the subrogee.[4]

Observation:

Some courts impose stricter standards on professionals than on laypersons in assessing whether mistakes are "excusable" for purposes of subrogation, especially when the professional relationship arises out of a commercial transaction involving consideration.[5] Additionally, the courts will determine whether there were facts which should have led the parties to conduct a further inquiry prior to awarding subrogation—the existence of such facts may warrant in denying such relief.[6]

CUMULATIVE SUPPLEMENT

Cases:

Would-be subrogee's negligence alone is insufficient to defeat equitable subrogation; rather, such negligence is only one of several factors that court must weigh in discerning where the line is between fairness and unjust enrichment. In re Jones, 534 B.R. 588 (Bankr. D. Vt. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Bank of America, N.A. v. Ping, 879 N.E.2d 665 (Ind. Ct. App. 2008).

2 Group Health, Inc. v. Heuer, 499 N.W.2d 526 (Minn. Ct. App. 1993).

3 Brooks v. Resolution Trust Corp., 599 So. 2d 1163 (Ala. 1992) (failure to properly search recorded encumbrances); First Nat. Bank of Jackson v. Huff, 441 So. 2d 1317 (Miss. 1983) (ordinary negligence).

4 Castleman Const. Co. v. Pennington, 222 Tenn. 82, 432 S.W.2d 669 (1968).

5 Universal Title Ins. Co. v. U.S., 942 F.2d 1311 (8th Cir. 1991) (applying Minnesota law).

6 Roth v. Porush, 281 A.D.2d 612, 722 N.Y.S.2d 566 (2d Dep't 2001).

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II. Elements or Conditions of Subrogation and Principles Governing

A. In General

§ 18. Assignability of subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 27

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Assignability of proceeds of claim for personal injury or death, 33 A.L.R.4th 82

Causes of action for subrogation are not assignable in some jurisdictions.[1] Thus, a cause of action for tortious injury to the person is not subject to subrogation unless made so by statute.[2] The reason sometimes given for this rule is that to allow such an assignment violates public policy.[3] However, other jurisdictions do not follow such a rule and accordingly since causes of action for damage or injury to persons and property survive and are assignable consequently so are claims for conventional subrogation.[4] In these jurisdictions, an intent to convey a right of subrogation must be clearly expressed.[5] In some jurisdictions, the public policy supporting the rule disallowing assignment of personal injury actions—namely "champerty"—does not exist in the context of subrogation.[6]

Footnotes

1 Fifield Manor v. Finston, 54 Cal. 2d 632, 7 Cal. Rptr. 377, 354 P.2d 1073, 78 A.L.R.2d 813 (1960); Royal Indem. Co. v. Security Truck Lines, 212 Cal. App. 2d 61, 27 Cal. Rptr. 858 (1st Dist. 1963).

2 Block v. California Physicians' Service, 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (2d Dist. 1966).

3 Piano v. Hunter, 173 Ariz. 172, 840 P.2d 1037, 78 Ed. Law Rep. 1099 (Ct. App. Div. 1 1992) (holding a third-party reimbursement provision in a trust agreement was unenforceable to permit a self-insured trust fund to be subrogated to a plan participant's personal injury action against a third-party tortfeasor and to require repayment of any amounts paid by the trust to the plan participant since the provision created an assignment of a personal injury claim and was, therefore, void and unenforceable as against public policy).

4 Stilson v. Hodges, 934 P.2d 736 (Wyo. 1997).

5 Washington Nat. Ins. Co. v. Brown, 654 So. 2d 724 (La. Ct. App. 1st Cir. 1995), writ denied, 661 So. 2d 497 (La. 1995).

6 Westchester Fire Ins. Co. v. Allstate Ins. Co., 236 Conn. 362, 672 A.2d 939 (1996) (equitable subrogation).

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73 Am. Jur. 2d Subrogation II B Refs.

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II. Elements or Conditions of Subrogation and Principles Governing

B. Classes of Persons Entitled to Subrogation

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 2, 22, 26

A.L.R. Library

A.L.R. Index, Subrogation
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II. Elements or Conditions of Subrogation and Principles Governing

B. Classes of Persons Entitled to Subrogation

§ 19. Parties entitled to subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 2

To be entitled to subrogation, one must pay a debt for which another is liable.[1] Generally speaking, certain persons are excluded and included in the class of persons who are entitled to subrogation with those being excluded pertaining to those who discharge debts on which their liability is primary.[2] In other words, there can be no right of subrogation when one pays a debt that he is obligated to pay,[3] nor is subrogation available to one who simply pays his own debt.[4] Equitable subrogation is not a remedy available to a lender that refinances the original debt owed to it.[5]

Recognized inclusions include principals who are vicariously liable for the acts of their agents or servants;[6] the state or local government—for example, where a debt is paid from a fund to benefit uninsured motorists,[7] where a State paid medical bills after an inmate sustained injuries,[8] or where a sheriff paid an obligation to a judgment creditor following his failure to levy upon debtors' property;[9] and the federal government.[10]

Observation:

As some courts have noted, in determining what types of parties are entitled to subrogation, a key consideration is whether the party making the payment was compelled to pay another's debt; under that circumstance, the party paying the debt has right to subrogation.[11] The courts also consider whether a direct or derivative obligation is involved.[12]

CUMULATIVE SUPPLEMENT

Cases:

Under Vermont law, in order for equitable subrogation to apply, the party paying the debt must not have been primarily liable for the debt paid, and that party must have paid the entire debt. GMAC Mortg., LLC v. Orcutt, 506 B.R. 52 (D. Vt. 2014).

Merchant was not equitably subrogated to any rights of bank, which acted as acquirer that facilitated credit card purchases at merchant, as against credit card company with respect to assessments imposed by company against bank in connection with data security breaches on merchant's computer system, and, thus, merchant failed to state claims against company for breach of contract and breach of implied duty of good faith and fair dealing based on theory of equitable subrogation, since bank withheld corresponding payments from merchant pursuant to indemnification clause in their contract, which obligated merchant to indemnify bank for any assessments imposed by company even in cases where company violated contract or law by imposing such assessments. Jetro Holdings, LLC v. MasterCard International, Inc., 166 A.D.3d 594, 88 N.Y.S.3d 193 (2d Dep't 2018).

[END OF SUPPLEMENT]

Footnotes

1 Countryside Co-op. v. Harry A. Koch Co., 280 Neb. 795, 790 N.W.2d 873 (2010).

2 Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc., 540 N.W.2d 647 (Iowa 1995); Deffenbaugh Industries, Inc. v. Wilcox, 28 Kan. App. 2d 19, 11 P.3d 98 (2000); Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co., 978 S.W.2d 754 (Ky. Ct. App. 1998); American Nursing Resources, Inc. v. Forrest T. Jones & Co., Inc., 812 S.W.2d 790 (Mo. Ct. App. W.D. 1991); Leader Nat. Ins. Co. v. American Hardware Ins. Group, 249 Neb. 783, 545 N.W.2d 451 (1996); PIE Mut. Ins. Co. v. Ohio Ins. Guar. Assn., 66 Ohio St. 3d 209, 1993-Ohio-180, 611 N.E.2d 313 (1993); Bennett Truck Transport, LLC v. Williams Bros. Const., 256 S.W.3d 730 (Tex. App. Houston 14th Dist. 2008).

3 Del E. Webb Hotel Co. v. Bentley, 8 Ariz. App. 408, 446 P.2d 687 (1968); Mortoro v. Maloney, 580 So. 2d 822 (Fla. 5th DCA 1991).

4 In re New England Fish Co., 749 F.2d 1277 (9th Cir. 1984); Mortoro v. Maloney, 580 So. 2d 822 (Fla. 5th DCA 1991); Benedictine Hosp. v. Glessing, 90 A.D.3d 1383, 935 N.Y.S.2d 683 (3d Dep't 2011).

5 Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011).

6 Bair v. Peck, 248 Kan. 824, 811 P.2d 1176 (1991).

7 People v. Orweller, 197 Mich. App. 136, 494 N.W.2d 753 (1992).

8 Holloway v. State, 125 N.J. 386, 593 A.2d 716 (1991).

9 Niell v. Mooney, 575 S.W.2d 147 (Tex. Civ. App. Eastland 1978), writ refused n.r.e., (Mar. 21, 1979).

10 U.S. v. California, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993).

11 In re Stendardo, 991 F.2d 1089 (3d Cir. 1993), as amended, (June 21, 1993) (applying Pennsylvania law); Iowa Nat. Mut. Ins. Co. v. Liberty Mut. Ins. Co., 464 N.W.2d 564 (Minn. Ct. App. 1990).

12 Sehremelis v. Farmers & Merchants Bank, 6 Cal. App. 4th 767, 7 Cal. Rptr. 2d 903, 17 U.C.C. Rep. Serv. 2d 831 (2d Dist. 1992) (holding a bank's negotiating checks drawn by a lender on borrowers' construction loan accounts which were allegedly deposited with forged, missing, or otherwise unauthorized endorsements did

not provide the borrowers with a cause of action against the collecting bank for equitable subrogation where to the extent that the borrowers paid the lender under loan agreements for the proceeds of a check which the collecting bank improperly negotiated, the borrowers' own rights of action were direct and not derivative).

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II. Elements or Conditions of Subrogation and Principles Governing

B. Classes of Persons Entitled to Subrogation

§ 20. Volunteers or strangers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 26

Subrogation, in its strict sense, does not apply to mere volunteers or intermeddlers who, without any duty, moral, or otherwise, pay the debts or discharge the obligations of another.[1] In other words, subrogation is unavailable for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own.[2] Put another way, to have a right to subrogation, the subrogee must not have acted as a volunteer;[3] a person having a direct interest in the discharge of the debt or lien is not a volunteer.[4] The rule that payments by volunteers will not support subrogation does not apply to conventional subrogation.[5] Furthermore, one having no interest in or relation to the matter may be entitled to subrogation where he pays the debt of another upon agreement that he shall be entitled to the rights and securities of the creditor so paid.[6]

Observation:

In order to support an award of subrogation, the payment must be made involuntarily.[7] Therefore, subrogation is not available if the payments are made voluntarily[8] by one under no legal or moral obligation to do so.[9] In other words, the simplest test for a volunteer appears to be whether the obligor or insurer made a payment for which he was not liable[10] and whether the party paying the money was under some duty or necessity to protect himself from loss.[11] However, the term "volunteer," as an exception to the right to subrogate, is narrowly and strictly interpreted to allow a liberal application of the doctrine.[12]

CUMULATIVE SUPPLEMENT

Cases:

Liquidating agent appointed under bankrupt limited liability company's (LLC's) confirmed Chapter 11 plan could not rely on doctrine of equitable subrogation to plausibly allege that LLC, a "pass through" entity, had any interest in refunds its members obtained of taxes previously paid by LLC, and thus liquidating agent could not state plausible claim against members for turnover of refunds, given that more than three years had passed since LLC paid taxes, such that any equitable subrogation claim was time-barred, given that LLC had acted as volunteer in paying taxes and not in any belief that it had any liability to taxing authority, and given that equitable subrogation would merely place LLC in position of taxing authority vis-a-vis its members, not confer any interest in refunds. 11 U.S.C.A. § 542(a). In re RedF Marketing, LLC, 589 B.R. 534 (Bankr. W.D. N.C. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Moon Realty Co., Inc. v. Arkansas Real Estate Co., Inc., 262 Ark. 703, 560 S.W.2d 800 (1978); Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 135 Ed. Law Rep. 268 (Fla. 1999); Erie Ins. Co. v. George, 681 N.E.2d 183 (Ind. 1997); Wine v. Globe American Cas. Co., 917 S.W.2d 558 (Ky. 1996); Hartford Acc. & Indem. Co. v. Used Car Factory, Inc., 461 Mich. 210, 600 N.W.2d 630 (1999); Brockhaus v. Lambert, 259 Neb. 160, 608 N.W.2d 588 (2000); PIE Mut. Ins. Co. v. Ohio Ins. Guar. Assn., 66 Ohio St. 3d 209, 1993-Ohio-180, 611 N.E.2d 313 (1993); United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994); World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998); Livingston v. Shelton, 85 Wash. 2d 615, 537 P.2d 774 (1975); Patients Compensation Fund v. Lutheran Hosp.-LaCrosse, Inc., 223 Wis. 2d 439, 588 N.W.2d 35 (1999); Northern Utilities Div. of K N Energy, Inc. v. Town of Evansville, 822 P.2d 829 (Wyo. 1991).
The right of subrogation does not extend to a mere volunteer but only to one who is obliged to pay the debt of another. Coburn v. Auto-Owners Ins. Co., 189 Ohio App. 3d 322, 2010-Ohio-3327, 938 N.E.2d 400 (10th Dist. Franklin County 2010).

2 Matagorda County v. Texas Ass'n of Counties County Government Risk Management Pool, 975 S.W.2d 782 (Tex. App. Corpus Christi 1998), judgment aff'd, 52 S.W.3d 128 (Tex. 2000); Norfolk & Dedham Fire Ins. Co. v. Aetna Cas. & Sur. Co., 132 Vt. 341, 318 A.2d 659 (1974).
Once properly yoked with the label of mere volunteer or officious payor, a plaintiff is prohibited from recovering under theory of subrogation. Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007).

3 Hibbs v. Allstate Ins. Co., 193 Cal. App. 4th 809, 123 Cal. Rptr. 3d 80 (2d Dist. 2011), as modified on denial of reh'g, (Mar. 24, 2011).

4 Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134, 43 A.L.R.5th 847 (1992).
An owner of real property would not be a volunteer if he satisfied an Internal Revenue Service lien owed by a third person to protect his interest in property in which he owned. Gaub v. Simpson, 866 P.2d 765 (Wyo. 1993).

A purchaser of property at a foreclosure sale is not mere a "volunteer" when he discharges an outstanding tax lien, and he is subrogated to the taxing authority's lien to the extent necessary for his equitable protection. Smart v. Tower Land and Inv. Co., 597 S.W.2d 333 (Tex. 1980).

5 Kansas City Title & Trust Co. v. Fourth Nat. Bank in Wichita, Kan., 135 Kan. 414, 10 P.2d 896, 87 A.L.R. 334 (1932); Security Ins. Co. of New Haven-The Connecticut Indem. Co. v. Mangan, 250 Md. 241, 242 A.2d 482, 5 U.C.C. Rep. Serv. 621 (1968); City of Detroit v. Bridgeport Brass Co., 28 Mich. App. 54, 184 N.W.2d 278 (1970).

Conventional subrogation, generally, see § 4.

6 Commercial Standard Ins. Co. v. American Emp. Ins. Co., 209 F.2d 60 (6th Cir. 1954); Boley v. Daniel, 72 Fla. 121, 72 So. 644 (1916); Smith v. Sprague, 244 Mich. 577, 222 N.W. 207 (1928).

7 Colony Ins. Co. v. Peachtree Const., Ltd., 647 F.3d 248 (5th Cir. 2011); A.J. Maggio Co. v. Willis, 316 Ill. App. 3d 1043, 250 Ill. Dec. 376, 738 N.E.2d 592 (1st Dist. 2000); Chadron Energy Corp. v. First Nat. Bank of Omaha, 236 Neb. 173, 459 N.W.2d 718, 12 U.C.C. Rep. Serv. 2d 1183 (1990).

8 Broadway Houston Mack Development LLC v. Kohl, 22 Misc. 3d 1001, 870 N.Y.S.2d 748 (Sup 2008), order aff'd, 71 A.D.3d 937, 897 N.Y.S.2d 505 (2d Dep't 2010).

9 North East Ins. Co. v. Concord General Mut. Ins. Co., 433 A.2d 715 (Me. 1981).

A property owner unwittingly, but quite effectively, benefited the vendor's lender, who sought a writ of execution by levy against the property, in the amount of $348,008 by paying off the bank's superior lien, and thus, the owner was equitably subrogated to the bank's lien in that amount; had the owner known or been informed of the lender's judgment against the vendor, she would have been entitled to delay settlement and not make that payment until the judgment was either satisfied or removed as a lien against the property, but her lack of actual knowledge about the judgment did not render her an officious intermeddler. Noor v. Centreville Bank, 193 Md. App. 160, 996 A.2d 928 (2010), cert. granted, 415 Md. 607, 4 A.3d 512 (2010) and appeal dismissed, 417 Md. 500, 10 A.3d 1180 (2011).

10 Norfolk & Dedham Fire Ins. Co. v. Aetna Cas. & Sur. Co., 132 Vt. 341, 318 A.2d 659 (1974).

11 Rawson v. City of Omaha, 212 Neb. 159, 322 N.W.2d 381 (1982); PIE Mut. Ins. Co. v. Ohio Ins. Guar. Assn., 66 Ohio St. 3d 209, 1993-Ohio-180, 611 N.E.2d 313 (1993).

12 North East Ins. Co. v. Concord General Mut. Ins. Co., 433 A.2d 715 (Me. 1981).

Subrogation doctrine as favored, see § 8.

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B. Classes of Persons Entitled to Subrogation

§ 21. Volunteers or strangers—Persons regarded as volunteers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 26

Generally speaking, the party making payment is a volunteer if, in so doing, he has no right or interest of his own to protect and acts without obligation, moral or legal, and without being requested by anyone liable on the obligation.[1] Thus, one who settles under threat of civil suit is not a "volunteer" and, thus, is not precluded from asserting right to subrogation.[2] Furthermore, one is not a volunteer where he pays the debt at the instance, solicitation, or request of the person whose liability he discharges.[3] One who, at the request of a surety, pays the surety's debt incurred by the principal's default is not a mere volunteer.[4]

In the absence of a subrogation agreement, it is essential to the right of subrogation that the person making the payments be one who is under some obligation regarding it or who has some interest to be protected by it.[5] However, payment, absent legal liability, does not necessarily make a payor officious for purposes of subrogation or unjust enrichment; the payor, in order to be deemed a volunteer, must have been unreasonable in its mistake regarding the legal obligation to pay.[6] Thus, a "volunteer," "stranger," or "intermeddler" is one who thrusts himself into a situation on his own initiative and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested and whose rights would be sacrificed did he not respond to importunate appeal.[7]

Practice Tip:

Whether one acts as a volunteer, such as to preclude entitlement to subrogation, is determined in light of all surrounding circumstances,[8] and courts are liberal in their determinations that payments were made involuntarily as an element for equitable subrogation.[9]

Footnotes

1 Morgan Creek Residential v. Kemp, 153 Cal. App. 4th 675, 63 Cal. Rptr. 3d 232, 63 U.C.C. Rep. Serv. 2d 507 (3d Dist. 2007); Kramer v. American Fidelity & Cas. Co. of Richmond, Va., 165 A.2d 924 (Mun. Ct. App. D.C. 1960); Fenly v. Revell, 170 Kan. 705, 228 P.2d 905 (1951); Reed v. Ramey, 82 Ohio App. 171, 37 Ohio Op. 529, 50 Ohio L. Abs. 596, 80 N.E.2d 250 (1st Dist. Hamilton County 1947); Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wash. App. 765, 189 P.3d 195 (Div. 1 2008).
One is a volunteer if he pays while under no obligation to pay or when no interest of his is protected by payment. Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007).

2 Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wash. App. 765, 189 P.3d 195 (Div. 1 2008).

3 Yonack v. Interstate Securities Co. of Tex., 217 F.2d 649 (5th Cir. 1954); Wragg v. Wragg, 208 Iowa 939, 226 N.W. 99, 64 A.L.R. 1292 (1929); Western Cas. & Sur. Co. v. Meyer, 301 Ky. 487, 192 S.W.2d 388, 164 A.L.R. 769 (1946).

4 Hult v. Ebinger, 222 Or. 169, 352 P.2d 583 (1960).

5 Norfolk & Dedham Fire Ins. Co. v. Aetna Cas. & Sur. Co., 132 Vt. 341, 318 A.2d 659 (1974).

6 Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007).

7 Mort v. U.S., 86 F.3d 890 (9th Cir. 1996).

8 Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wash. App. 765, 189 P.3d 195 (Div. 1 2008).

9 Frymire Engineering Co., Inc. ex rel. Liberty Mut. Ins. Co. v. Jomar Intern., Ltd., 259 S.W.3d 140 (Tex. 2008).

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B. Classes of Persons Entitled to Subrogation

§ 22. Persons acting in self-protection

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 22

The right of subrogation is not necessarily confined to those who are legally bound to make the payment but extends as well to persons who pay the debt in self-protection since they might suffer loss if the obligation is not discharged.[1] A person who has an interest to protect by making the payment is not regarded as a volunteer.[2] Specifically, the doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest or to save his or her own property.[3]

When invoking the need to protect its own legal or economic interests as a ground for subrogation, the party seeking subrogation must show that the act is not merely helpful but also necessary to the protection of its interests.[4] However, the extent or quantity of the subrogee's interest which is in jeopardy is not material if he has any palpable interest which will be protected by the extinguishment of the debt.[5] The courts impose additional requirements that the person making the payment be acting in good faith and under a reasonable belief that it is necessary to his protection even though it turns out that he had no interest to protect.[6]

An interest in one's reputation may suffice to show that payment of another person's debt is not voluntary as required to satisfy standard for equitable subrogation.[7]

Footnotes

1 Mort v. U.S., 86 F.3d 890 (9th Cir. 1996); Dodson v. Key, 508 S.W.2d 586 (Ky. 1974); Cagle, Inc. v. Sammons, 198 Neb. 595, 254 N.W.2d 398 (1977); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 176 S.E.2d 751 (1970).

2 Baker v. Leigh, 238 Ark. 918, 385 S.W.2d 790 (1965); Standard Fire Ins. Co. v. Empire Fire and Marine Ins. Co., 234 S.W.3d 377 (Ky. Ct. App. 2007); George L. Schnader, Jr., Inc. v. Cole Bldg. Co., 236 Md. 17, 202 A.2d 326 (1964); Cagle, Inc. v. Sammons, 198 Neb. 595, 254 N.W.2d 398 (1977).
Equitable subrogation should not be precluded on the basis that the party seeking subrogation is a purchaser of property who has paid the existing encumbrance in connection with the purchase even though the purchaser's interest did not preexist the purchase, and the purchasers' funds were paid first into escrow and then distributed to the lienholder; in paying off the encumbrance, a purchaser is protecting his or her concurrently acquired interest by ensuring clear title to the property and is therefore not a mere volunteer. Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 258 P.3d 281 (Ct. App. Div. 1 2011), review granted, (Nov. 29, 2011) and opinion aff'd, 2012 WL 1138251 (Ariz. 2012).

3 Countryside Co-op. v. Harry A. Koch Co., 280 Neb. 795, 790 N.W.2d 873 (2010); Broadway Houston Mack Development, LLC v. Kohl, 71 A.D.3d 937, 897 N.Y.S.2d 505 (2d Dep't 2010).

4 Broadway Houston Mack Development, LLC v. Kohl, 71 A.D.3d 937, 897 N.Y.S.2d 505 (2d Dep't 2010).

5 Employers Mut. Liability Ins. Co. of Wis. v. Pacific Indem. Co., 167 Cal. App. 2d 369, 334 P.2d 658 (1st Dist. 1959); Trueman Fertilizer Co. v. Allison, 81 So. 2d 734 (Fla. 1955); Katschor v. Ley, 153 Kan. 569, 113 P.2d 127 (1941).

6 Employers Mut. Liability Ins. Co. of Wis. v. Pacific Indem. Co., 167 Cal. App. 2d 369, 334 P.2d 658 (1st Dist. 1959); Williams v. Johnston, 92 Idaho 292, 442 P.2d 178 (1968); Harrison v. Harrison, 149 Tenn. 601, 259 S.W. 906, 32 A.L.R. 563 (1924).

7 Nappi v. Nappi Distributors, 1997 ME 54, 691 A.2d 1198 (Me. 1997).

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73 Am. Jur. 2d Subrogation II C Refs.

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C. Payments to Support

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II. Elements or Conditions of Subrogation and Principles Governing

C. Payments to Support

1. In General

§ 23. Payment of debt

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 21

The payment of a debt is a prerequisite to acquiring subrogation rights.[1] In other words, to entitle a party to subrogation, he must pay a debt for which another is primarily responsible.[2] This rule follows from the general proposition that a subrogee stands in the shoes of a subrogor but only to the extent that the subrogee has made payments.[3]

Footnotes

1 State Bar of California v. Statile, 168 Cal. App. 4th 650, 86 Cal. Rptr. 3d 72 (1st Dist. 2008).
A subrogee must first tender payment to the subrogor in satisfaction of a debt before a right to subrogation accrues. Wimer v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 627, 939 A.2d 843 (2007).

2 Meyer v. Levy, 169 So. 2d 339 (Fla. 3d DCA 1964); Benge v. State Farm Mut. Auto. Ins. Co., 297 Ill. App. 3d 1062, 232 Ill. Dec. 172, 697 N.E.2d 914 (1st Dist. 1998); Dairyland Ins. Co. v. Herman, 1998-NMSC-005, 124 N.M. 624, 954 P.2d 56 (1997); Republic Steel Corp. v. Glaros, 12 Ohio App. 2d 29, 41 Ohio Op. 2d 86, 230 N.E.2d 667 (7th Dist. Mahoning County 1967).
The right to subrogation arises upon payment. RLI Ins. Co. v. Turner/Santa Fe, 58 A.D.3d 413, 870 N.Y.S.2d 313 (1st Dep't 2009).
To assert a valid subrogation claim, an alleged subrogee is required to make a payment to an alleged subrogor. Konkel v. Acuity, 321 Wis. 2d 306, 2009 WI App 132, 775 N.W.2d 258 (Ct. App. 2009).

3 Beacon Bowl, Inc. v. Wisconsin Elec. Power Co., 176 Wis. 2d 740, 501 N.W.2d 788 (1993).

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II. Elements or Conditions of Subrogation and Principles Governing

C. Payments to Support

1. In General

§ 24. Liability without actual payment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 21

Subrogation does not apply where the party seeking reimbursement has not paid the debts of another.[1] Generally speaking, the mere liability to pay is ordinarily not enough for one to be substituted to rights of a creditor in subrogation.[2] However, where special circumstances exist, equity will allow subrogation where a liability only, and not a payment, is shown.[3]

Footnotes

1 Kottler v. State, 136 Wash. 2d 437, 963 P.2d 834 (1998).

2 Iusi v. City Title Ins. Co., 213 Cal. App. 2d 582, 28 Cal. Rptr. 893 (1st Dist. 1963); Federal Sav. & Loan Ins. Corp. v. Huff, 237 Kan. 873, 704 P.2d 372 (1985).
Personal guarantors did not have a claim of subrogation against the principal debtor, even though the bank obtained judgments to collect on their personal guaranties, where the guarantors had not yet satisfied the judgments. Emprise Bank v. Rumisek, 42 Kan. App. 2d 498, 215 P.3d 621 (2009), review denied, (Sept. 7, 2010).

3 U. S. Fidelity & Guaranty Co. v. Maryland Cas. Co., 186 Kan. 637, 352 P.2d 70 (1960); Jones v. Jones, 158 Kan. 196, 146 P.2d 405 (1944).

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II. Elements or Conditions of Subrogation and Principles Governing

C. Payments to Support

2. Necessity That Entire Debt Be Paid

§ 25. "Made whole" doctrine; partial payment of debt

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 28

Generally, a person is not entitled to be subrogated to the rights of another until the claim of the creditor against the debtor has been paid in full;[1] this antisubrogation rule is known as the "made whole doctrine."[2] Part payment will not create a right of subrogation.[3] Until the debt is paid in full, there can be no interference with the creditor's rights or securities that might, even by a bare possibility, prejudice or in any way embarrass him in the collection of the residue of his debt.[4]

The rule that the debt must be paid in full is invoked for the protection of the creditor and never to defeat contract obligations in the interest of the debtor alone.[5] In other words, the rationale behind the rule that where less than the total amount of a debt is tendered by a party seeking subrogation to a senior lienholder's priority position, equitable subrogation is not permitted is that equitable subrogation should not prejudice the senior lienholder's attempt to collect the entire indebtedness secured by the senior lien.[6] The rule against allowing subrogation on the basis of part payment does not apply where the reason for it does not exist as where there is no possibility that the creditor could be in any way prejudiced.[7]

Practice Tip:

With respect to multiple tortfeasors, determining when a debt has been paid in full—where a case settles as opposed to resolution by way of trial—is made by examining whether the initial tortfeasor enter into a settlement with the injured party and whether the injured party reserved a cause of action against a successor tortfeasor; if no reservation is made, the legal presumption is that the injured party recovered its entirety of damages by way of settlement, and the right to sue the successor tortfeasor is therefore lost,

thus making way for subrogation.[8] In all other cases, the rule appears to be that the procedure typically used in determining whether the plaintiff has fully recovered, and therefore whether the plaintiff is entitled to subrogation, involves computing the plaintiff's "total loss" and "total recovery," and if the "total recovery" exceeds the "total loss," then subrogation should be allowed.[9]

Footnotes

1 Dietrich Industries, Inc. v. U.S., 988 F.2d 568 (5th Cir. 1993) (applying Texas law); Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 135 Ed. Law Rep. 268 (Fla. 1999); In re Concordia Mercantile Co., 173 Kan. 155, 244 P.2d 1175 (1952); Wine v. Globe American Cas. Co., 917 S.W.2d 558 (Ky. 1996); Dumas v. Angus Chemical Co., 742 So. 2d 655 (La. Ct. App. 2d Cir. 1999), writ not considered, 751 So. 2d 237 (La. 1999); Muller v. Society Ins., 2008 WI 50, 309 Wis. 2d 410, 750 N.W.2d 1 (2008).
Equitable subrogation requires the subrogee to discharge the entire debt held by the original obligor. Bank of America, N.A. v. Ping, 879 N.E.2d 665 (Ind. Ct. App. 2008).

2 Muller v. Society Ins., 2008 WI 50, 309 Wis. 2d 410, 750 N.W.2d 1 (2008).
The "made whole" doctrine, or rule, states that, under common law subrogation, the subrogor must be made whole before the subrogee may recover anything from the tortfeasor. Monte de Oca v. State Farm Fire & Cas. Co., 897 So. 2d 471 (Fla. 3d DCA 2004).

3 Emprise Bank v. Rumisek, 42 Kan. App. 2d 498, 215 P.3d 621 (2009), review denied, (Sept. 7, 2010).

4 Sawyer v. Zacavich, 178 Cal. App. 2d 605, 3 Cal. Rptr. 6 (2d Dist. 1960).

5 U. S. Fidelity & Guaranty Co. v. Maryland Cas. Co., 186 Kan. 637, 352 P.2d 70 (1960); Sherman v. El Paso Nat. Bank, 100 S.W.2d 402 (Tex. Civ. App. El Paso 1936), writ dismissed.

6 Dietrich Industries, Inc. v. U.S., 988 F.2d 568 (5th Cir. 1993); Byers v. McGuire Properties, Inc., 285 Ga. 530, 679 S.E.2d 1 (2009).

7 Zeigler v. Blount Bros. Const. Co., 364 So. 2d 1163 (Ala. 1978); Patek v. California Cotton Mills, 4 Cal. App. 2d 12, 40 P.2d 927 (1st Dist. 1935); U. S. Fidelity & Guaranty Co. v. Maryland Cas. Co., 186 Kan. 637, 352 P.2d 70 (1960).

8 Keith v. B.E.W. Ins. Group, Inc., 595 So. 2d 178 (Fla. 2d DCA 1992).

9 CNA Ins. Companies v. Johnson Galleries of Opelika, Inc., 639 So. 2d 1355 (Ala. 1994).

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C. Payments to Support

2. Necessity That Entire Debt Be Paid

§ 26. Payment of part by subrogee and balance by others

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 28

The rule that payment of the whole debt is a prerequisite to subrogation does not require that payment of the entire sum be by one creditor; it does not apply where a part of the debt or claim is paid by the surety or other person seeking subrogation, and the balance is paid by the principal or in some other manner.[1]

Footnotes

1 Furlong v. Leybourne, 138 So. 2d 352 (Fla. 3d DCA 1962); Hustad v. Reed, 133 Mont. 211, 321 P.2d 1083 (1958); Providence Institution for Sav. v. Sims, 441 S.W.2d 516 (Tex. 1969).
Where an intended beneficiary has an enforceable claim against the promisee, he can obtain a judgment or judgments against either the promisee or the promisor or both based on their respective duties to him; satisfaction in whole or in part of either of these duties, or of a judgment thereon, satisfies to that extent the other duty or judgment, subject to the promisee's right of subrogation. Restatement Second, Contracts § 310(1).
To the extent that the claim of an intended beneficiary is satisfied from assets of the promisee, the promisee has a right of reimbursement from the promisor, which may be enforced directly and also, if the beneficiary's claim is fully satisfied, by subrogation to the claim of the beneficiary against the promisor and to any judgment thereon and to any security therefor. Restatement Second, Contracts § 310(2).

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C. Payments to Support

2. Necessity That Entire Debt Be Paid

§ 27. Exception for conventional subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 28

The rule that one who pays part only of the debt is not entitled to subrogation unless the balance of the debt is paid in some other manner applies only to subrogation by operation of law—it does not bar conventional subrogation resulting from an express agreement with the creditor.[1]

Footnotes

1 Security Ins. Co. of New Haven-The Connecticut Indem. Co. v. Mangan, 250 Md. 241, 242 A.2d 482, 5 U.C.C. Rep. Serv. 621 (1968); American Surety Co. of New York v. Clarke, 94 Mont. 1, 20 P.2d 831 (1933); Harrison v. Harrison, 149 Tenn. 601, 259 S.W. 906, 32 A.L.R. 563 (1924).

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C. Payments to Support

2. Necessity That Entire Debt Be Paid

§ 28. Consent, acquiescence, and estoppel

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 22, 28

Since the rule against allowing subrogation on the basis of a part payment is solely for the protection of the creditor, subrogation may be had if the creditor consents to or acquiesces in it.[1] If the debtor does not object, no one else is entitled to object.[2] Of course, if the primary creditor objects to partial subrogation and this objection is made to protect the primary creditor's interests, then subrogation will not follow.[3]

Footnotes

1 Grant Thornton v. Syracuse Sav. Bank, 961 F.2d 1042, 22 Fed. R. Serv. 3d 593 (2d Cir. 1992); Providence Institution for Sav. v. Sims, 441 S.W.2d 516 (Tex. 1969).

2 Schmid v. First Camden Nat. Bank & Trust Co., 130 N.J. Eq. 254, 22 A.2d 246 (Ch. 1941); Harrison v. Harrison, 149 Tenn. 601, 259 S.W. 906, 32 A.L.R. 563 (1924); Providence Institution for Sav. v. Sims, 441 S.W.2d 516 (Tex. 1969).

3 Grant Thornton v. Syracuse Sav. Bank, 961 F.2d 1042, 22 Fed. R. Serv. 3d 593 (2d Cir. 1992).

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III. Applications of Doctrine

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 11, 19, 22, 23(1), 25

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 1, 11, 19, 22, 23(1), 25

Forms

Am. Jur. Pleading and Practice Forms, Automobile Insurance §§ 366 to 386
Am. Jur. Pleading and Practice Forms, Insurance §§ 651 to 657, 663 to 666
Am. Jur. Pleading and Practice Forms, Subrogation §§ 4 to 6

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III. Applications of Doctrine

A. In General

1. Common Occasions of Subrogation

§ 29. Fraud or mistake

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Subrogation rests largely on the prevention of frauds and on relief against mistakes.[1] Thus, subrogation will be allowed in a proper case where payment of money has been obtained through fraud,[2] and subrogation prevents unjust enrichment as a result of the inadvertent release of a security interest in land.[3] However, equitable subrogation cannot be applied to a sophisticated lender by the mere assertion of a mistake.[4]

Footnotes

1 Progressive Consumers Federal Credit Union v. U.S., 79 F.3d 1228 (1st Cir. 1996) (holding assignee of a mortgage was entitled to be subrogated to a mortgagee's mortgage lien priority position over competing federal tax liens which was restored to the mortgagee who mistakenly refinanced the first mortgage while unaware of existence of junior tax liens); In re Bridge, 18 F.3d 195 (3d Cir. 1994); Hieber v. Florida Nat. Bank, 522 So. 2d 878 (Fla. 3d DCA 1988) (denying subrogation to purchasers of mortgaged property who applied part of a purchase price to discharge the first mortgage while under a mistake of fact as to the existence of a junior lien where the junior lien was of record); East Boston Sav. Bank v. Ogan, 428 Mass. 327, 701 N.E.2d 331 (1998); Metrobank For Sav., FSB v. National Community Bank of New Jersey, 262 N.J. Super. 133, 620 A.2d 433 (App. Div. 1993); ABN AMRO Mtge. Group v. Kangah, 126 Ohio St. 3d 425, 2010-Ohio-3779, 934 N.E.2d 924 (2010); Hartnett v. Hampton Inns, Inc., 870 S.W.2d 162 (Tex. App. San Antonio 1993), writ denied, (June 15, 1994).

2 Federal Land Bank of Columbia v. Godwin, 107 Fla. 537, 145 So. 883 (1933).

Equitable subrogation applied to a mortgagee's claim to the residence of a former wife whose former husband allegedly had forged her name on the mortgage securing a loan to discharge the prior mortgage executed by the spouses; the mortgagee was not a volunteer but paid off the prior mortgage in order to protect its interest in the homestead, and even though the mortgagee allegedly was negligent in failing to discover the forgery, allowing it to obtain relief in amount of prior mortgage was not unjust. Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007).

3 Rush v. Alaska Mortg. Group, 937 P.2d 647 (Alaska 1997).

A homeowner, who had been defrauded by her vendors, did not have a right of equitable subrogation against the purchasers of the home at a foreclosure sale on the second mortgage, though she had made payments to the vendors which the vendors in turn used to pay the first mortgage, as the purpose of the doctrine was to prevent unjust enrichment of a debtor who owed the debt that was paid, and the vendors, rather than the foreclosure sale purchasers, were the parties unjustly enriched by the owner's payments. Casstevens v. Smith, 269 S.W.3d 222 (Tex. App. Texarkana 2008).

4 Wilshire Servicing Corp. v. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct. App. 2001).

Equitable subrogation, generally, see § 5.

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III. Applications of Doctrine

A. In General

1. Common Occasions of Subrogation

§ 30. Misapplication of funds or property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 25

As a general rule, one whose funds or property are mistakenly or fraudulently applied by another to an indebtedness for which such owner is not liable may be subrogated to the rights of the creditor and to the security held by him.[1]

Footnotes

1 Newell v. Hadley, 206 Mass. 335, 92 N.E. 507 (1910) (misappropriation by a trustee); In re Guardianship and Conservatorship of Bloomquist, 246 Neb. 711, 523 N.W.2d 352 (1994) (recovery and accounting for a trust fund); Kaminski v. Kaminczak, 86 S.W.2d 883 (Tex. Civ. App. Beaumont 1935) (misappropriation by a guardian).

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III. Applications of Doctrine

A. In General

2. Payment for Loss Caused by Another's Tort

§ 31. Contractual liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

A.L.R. Library

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262

Right of "Blue Cross" or "Blue Shield," or similar hospital or medical service organization, to be subrogated to certificate holder's claims against tortfeasor, 73 A.L.R.3d 1140

Forms

Am. Jur. Pleading and Practice Forms, Insurance §§ 651 to 657 (Subrogation of insurer against tortfeasor)

Am. Jur. Pleading and Practice Forms, Insurance §§ 663 to 666 (Subrogation of insurer against insured)

The doctrine of subrogation may be invoked in favor of persons who are legally obligated to make good a loss caused by another's tort.[1] In other words, the victim of a tort is the proper plaintiff, and insurers or other third-party providers of assistance and medical care to the victim may recover only to the extent that their contracts subrogate them to the victim's rights.[2] Indemnitors

fall within this rule—either by express or implied contract—and they bind themselves to save harmless the person indemnified, and where they do so by paying the loss or damage, they are undoubtedly entitled to be subrogated to the indemnitee's rights against the person responsible.[3] In other words, subrogation in this instance is a right pursuant to which a portion of the injured plaintiff's rights against the tortfeasor responsible for the injuries are assigned to the subrogee.[4]

Caution:

In some jurisdictions, absent statute or contract to the contrary, the right to subrogation for paid medical expenses resulting from tortious activity is not dependent upon the injured party's ability to obtain recovery for such medical expenses from the tortfeasor; instead, a medical provider's claim generally rests upon debtor-creditor relationship, and such claim cannot be extinguished or barred by the doctrine of subrogation.[5] However, the right to recover paid medical bills may be limited; for example, although an employer was subrogated to the rights of its employee for medical and disability benefits paid to the employee pursuant to a medical benefits plan, the employer had no right of subrogation as to the employee's right to recover other damages, such as for pain and suffering.[6] Furthermore, some jurisdictions have even gone as far as to abolish an insurance company's right to subrogation, especially where it pertained to reimbursement for paid health and medical benefits.[7]

Obviously, subrogation will not lie if the party did not suffer injuries or receive any benefits.[8]

CUMULATIVE SUPPLEMENT

Cases:

City was not required to indemnify health plan administrator under administrative services agreement for claim by a hospital against administrator alleging fraudulent misrepresentation, where indemnification provision in the agreement expressly released the city from any obligation to indemnify administrator for any claim, action, cause of action, or liability resulting from administrator's willful misconduct or fraud; "claim" under the agreement did not require an adjudication on the merits of a willful misconduct or fraud claim. Group Resources, Inc. v. City of Waycross, 812 S.E.2d 141 (Ga. Ct. App. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Potoczny, to Use of City of Philadelphia v. Vallejo, 170 Pa. Super. 377, 85 A.2d 675 (1952); Jennings v. Nationwide Ins. Co., 669 A.2d 534 (R.I. 1996); Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liability Ins. Plan, 200 Wis. 2d 599, 547 N.W.2d 578 (1996) (noting that subrogation is derivative of an injured person's right to recover from a tortfeasor).

2 State of Sao Paulo of Federative Republic of Brazil v. American Tobacco Co., 919 A.2d 1116 (Del. 2007).

A public employees benefit trust fund, as the administrator of a health care plan, had a contractual right to subrogation in the proceeds of the settlement of a subscriber's medical malpractice action; the state police handbook stated that the plan would be subrogated and succeed to any rights the subscriber had for recovery of expenses against any person or organization to the extent that the benefits for covered services were provided or paid. Valora v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 574, 939 A.2d 312 (2007).

3 Aetna Life Ins. Co. v. Moses, 287 U.S. 530, 53 S. Ct. 231, 77 L. Ed. 477, 88 A.L.R. 647 (1933); Bedal v. Hallack & Howard Lumber Co., 226 F.2d 526 (9th Cir. 1955); Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967).

Subrogation in a workers' compensation context occurs when a third person who pays a creditor succeeds to the creditor's rights against the debtor as if the third person were the creditor's assignee. Meyer v. North Dakota Workers Compensation Bureau, 512 N.W.2d 680 (N.D. 1994).

A distributor could not recover from another distributor the pro rata share of costs it incurred in defending a retailer in a suit against it, even though the other distributor provided the substantial portion of goods in question, and the other distributor signed an indemnity agreement with the retailer, where the first distributor was not a third party beneficiary of the indemnity agreement, and the first distributor's indemnity agreement with the retailer provided that it was subrogated to the retailer's rights against other suppliers only if it supplied the retailer with 80% of the goods in question, which it did not do. Quality King Distributors, Inc. v. E & M ESR, Inc., 36 A.D.3d 780, 827 N.Y.S.2d 700 (2d Dep't 2007).

4 Trevino v. HHL Financial Services, Inc., 945 P.2d 1345 (Colo. 1997), as modified on denial of reh'g, (Oct. 20, 1997).

5 Porter v. McPherson, 198 W. Va. 158, 479 S.E.2d 668 (1996).

6 Leasher v. Leggett & Platt, Inc., 96 Ohio App. 3d 367, 645 N.E.2d 91 (12th Dist. Warren County 1994).

7 Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001).

8 Leasher v. Leggett & Platt, Inc., 96 Ohio App. 3d 367, 645 N.E.2d 91 (12th Dist. Warren County 1994) (holding employer had no right of subrogation to employee's wife pursuant to medical benefits plan which provided that if employee or dependent received benefits or payments for physical condition or injury caused by third party, that plan had a right to recover any amount it paid where the wife sustained no injuries in the accident and received no benefits).

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III. Applications of Doctrine

A. In General

2. Payment for Loss Caused by Another's Tort

§ 32. Secondary tort liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 11

A.L.R. Library

Right to subrogation, as against primary insurer, of liability insurer providing secondary insurance, 31 A.L.R.2d 1324

Forms

Am. Jur. Pleading and Practice Forms, Subrogation §§ 4 to 6 (Secondary liability)

Where a tort claim has been paid by one whose liability therefor was secondary, he may be subrogated to the rights of the injured party against the wrongdoer.[1] This rule also applies in the case of multiple tortfeasors such that an initial tortfeasor may maintain an independent action for subrogation against a subsequent tortfeasor aggravating an injury.[2] The rationale underlying the rule is that even though an initial tortfeasor is subject to the total financial burden of the victim's injuries—including those caused by the actions of a subsequent tortfeasor—the initial tortfeasor is provided with a remedy so as to deny the subsequent tortfeasor a windfall.[3] In the case of employer-employee, under the doctrine of respondeat superior, a master becomes liable

for personal injuries caused solely by the negligent act of his servant and is obliged to respond in damages by reason of such liability, and he will be subrogated to the rights of the injured party and may recover from the servant, the one primarily liable.[4]

Footnotes

1 Losito v. Kruse, 136 Ohio St. 183, 16 Ohio Op. 185, 24 N.E.2d 705, 126 A.L.R. 1194 (1940).

2 Keith v. B.E.W. Ins. Group, Inc., 595 So. 2d 178 (Fla. 2d DCA 1992).

3 Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702 (Fla. 1980).

4 American Southern Ins. Co. v. Dime Taxi Service, Inc., 275 Ala. 51, 151 So. 2d 783, 4 A.L.R.3d 611 (1963); Fenly v. Revell, 170 Kan. 705, 228 P.2d 905 (1951); Maryland Cas. Co. v. Aetna Cas. & Sur. Co., 191 Va. 225, 60 S.E.2d 876 (1950).

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A. In General

2. Payment for Loss Caused by Another's Tort

§ 33. Subrogation of person causing injury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 11

A.L.R. Library

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 A.L.R.4th 231

Generally, one who is himself in the wrong cannot lay any equitable claim to subrogation.[1] However, where an injury negligently inflicted has been later aggravated by improper medical treatment, the original tortfeasor, having settled the whole claim, is subrogated to the injured person's cause of action for malpractice.[2] In such a case, one tortfeasor should be permitted to amend its pleadings to seek subrogation of the accident victim's cause of action against the physician for malpractice where his injuries were directly attributable to the physician's negligence.[3]

CUMULATIVE SUPPLEMENT

Cases:

Railroad sufficiently alleged common liability with locomotive seat manufacturer with respect to amount of Federal Employers' Liability Act (FELA) settlement, expenses, and attorney fees railroad incurred as result of physical harm caused to railroad's

engineer by allegedly defective seat, and, thus, stated equitable subrogation claim under Nebraska law; railroad alleged that harm for which it paid FELA settlement for was engineer's injury, railroad alleged that manufacturer was also liable for same injury, and fact that manufacturer might be liable for engineer's injury under different theory of recovery than FELA was of no consequence. 45 U.S.C.A. § 51 et seq. BNSF Railway Company v. Seats, Incorporated, 361 F. Supp. 3d 947 (D. Neb. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 16.

2 Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702 (Fla. 1980); Clark v. Halstead, 276 A.D. 17, 93 N.Y.S.2d 49 (3d Dep't 1949); Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756, 50 A.L.R. 1106 (1927).

3 City of Lauderdale Lakes v. Underwriters at Lloyds, 373 So. 2d 944 (Fla. 4th DCA 1979).

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A. In General

3. Specific Applications

§ 34. Corporation's debts or obligations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 23(1)

A president or other officer of a private corporation who, in order to protect the property of the corporation and thereby his own interests, pays its debts or obligations may generally be entitled to subrogation.[1]

Footnotes

1 Rebozo v. Royal Indem. Co., 369 So. 2d 644 (Fla. 3d DCA 1979); Lee v. Threshermen's Mut. Ins. Co., 26 Wis. 2d 361, 132 N.W.2d 534 (1965).

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III. Applications of Doctrine

A. In General

3. Specific Applications

§ 35. Payments or advances for benefit of decedents' estates

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 19

Generally speaking, a person who has loaned money to an executor or an administrator which is used for the benefit of the estate, while having no legal claim except against the representative personally, is, on equitable principles, entitled to be subrogated to the right of the representative to reimbursement from the estate for his expenditure for its benefit.[1] However, this right of subrogation does not go the rights of the creditor whose claim has been satisfied by the moneys advanced.[2] Furthermore, where such subrogation is sought, it should clearly appear that the money advanced has been applied for the benefit of the estate.[3] However, in the absence of an agreement for subrogation, a third person advancing money to the representatives or beneficiaries of an estate may not be entitled to such relief where he has no interest to protect, is under no obligation to make the loan, and is in a sense a mere volunteer.[4] The rule is different if the person advancing the money is an heir himself—in that case, the heir would be entitled to subrogation.[5]

Footnotes

1 Berry v. Stigall, 253 Mo. 690, 162 S.W. 126 (1913); Gilbert v. First Nat. Bank, Minatare, Neb., 154 Neb. 404, 48 N.W.2d 401 (1951); In re Skarda's Will, 88 N.M. 130, 537 P.2d 1392 (1975); Yokum v. Yokum, 110 W. Va. 221, 157 S.E. 579 (1931).

2 In re Shevitz' Estate, 157 N.Y.S.2d 282 (Sur. Ct. 1953).

3 Harford Bank of Bel Air v. Hopper's Estate, 169 Md. 314, 181 A. 751 (1935); Gilbert v. First Nat. Bank, Minatare, Neb., 154 Neb. 404, 48 N.W.2d 401 (1951); In re Skarda's Will, 88 N.M. 130, 537 P.2d 1392 (1975).

4 Putney v. Bryan, 142 Ga. 118, 82 S.E. 519 (1914).

5 Succession of McCall v. McCall, 550 So. 2d 328 (La. Ct. App. 3d Cir. 1989) (holding, in an action to require heirs and legatees to pay their proportionate share of federal estate and state inheritance taxes on cash not included in descriptive lists, that the heir who paid the taxes was legally subrogated to the rights of the taxing authorities against the other heirs and legatees).

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III. Applications of Doctrine

A. In General

3. Specific Applications

§ 36. Subrogation to claims against bank

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 23(1)

A surety for a bank which is a depository of public funds may, on making good the public's claim, be entitled to subrogation.[1]

Before allowing subrogation, some courts will balance the equities of the bank vis-a-vis the surety.[2] Thus, some courts refuse to allow subrogation in such a case unless the bank participated in the wrong or was negligent in paying the instrument.[3]

Footnotes

1 American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 314 U.S. 314, 62 S. Ct. 226, 86 L. Ed. 241, 138 A.L.R. 509 (1941); U.S. Fidelity & Guaranty Co. v. Bramwell, 108 Or. 261, 217 P. 332, 32 A.L.R. 829 (1923).

2 U.S. Fidelity & Guaranty Co. v. First Nat. Bank of S. C. of Columbia, 244 S.C. 436, 137 S.E.2d 582 (1964).
Balancing of equities, generally, see § 14.
Where a surety on a public officer's bond has paid the amounts the officer obtained from public funds by the use of forged instruments, it has been held that the equities of the surety are not superior to those of a bank that paid the forged instruments in the regular course of business without reason to doubt their genuineness. Fidelity & Cas. Co. of New York v. National Bank of Tulsa, 1963 OK 286, 388 P.2d 497 (Okla. 1963).

3 Hartford Acc. & Indem. Co. v. All Am. Nut Co., 220 Cal. App. 2d 545, 34 Cal. Rptr. 23 (2d Dist. 1963); Security Fence Co. v. Manchester Federal Sav. & Loan Ass'n, 101 N.H. 190, 136 A.2d 910 (1957).

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A. In General

3. Specific Applications

§ 37. Cojudgment debtors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 11

A.L.R. Library

Contribution, subrogation, and similar rights, as between cotenants, where one pays the other's share of sum owing on mortgage or other lien, 48 A.L.R.2d 1305

Bankruptcy: codebtor's subrogation rights under 11 U.S.C.A. sec. 509, 86 A.L.R. Fed. 886

Generally speaking, where a cojudgment debtor pays a judgment, he is subrogated thereto as against the other cojudgment debtors.[1] However, not all courts follow this rule, and in some cases, the courts have denied the right of a cojudgment debtor who paid the judgment to subrogation against other codebtors.[2] In other cases, the courts have considered whether a provision for subrogation was inserted into the judgment in determining whether or not subrogation would be ordered.[3]

Footnotes

1 Byrnes v. Phoenix Assur. Co. of N.Y., 178 F. Supp. 488 (E.D. Wis. 1959); Tucker v. Nicholson, 12 Cal. 2d 427, 84 P.2d 1045 (1938); North v. Albee, 155 Fla. 515, 20 So. 2d 682, 157 A.L.R. 490 (1945); Hofler v. Hill, 311 N.C. 325, 317 S.E.2d 670 (1984).

2 Lynch v. Jones, 179 A.D. 613, 166 N.Y.S. 1047 (4th Dep't 1917); Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939) (failure to comply with statutory provisions); Williams v. Hedrick, 131 S.W.2d 187 (Tex. Civ. App. Beaumont 1939), writ dismissed, judgment correct.

A prior receiver of a nursing home was not equitably subrogated to the position of a creditor that obtained a judgment against both the prior receiver and the nursing home's current receiver by paying the full amount due from both receivers in satisfaction of the judgment; both receivers were fully and equally liable to the creditor, and thus, the prior receiver was merely paying his own debt when he satisfied the judgment. Benedictine Hosp. v. Glessing, 90 A.D.3d 1383, 935 N.Y.S.2d 683 (3d Dep't 2011).

3 Orchard & Wilhelm Co. v. Sexson, 119 Neb. 370, 229 N.W. 17 (1930); Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955); Polk v. Seale, 144 S.W. 329 (Tex. Civ. App. Galveston 1912).

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73 Am. Jur. 2d Subrogation III B Refs.

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Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 6, 7(1), 7(4), 7(9), 8

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 6, 7(1), 7(4), 7(9), 8

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§ 38. Rights incidental to discharge of debt

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 6

A.L.R. Library

Right of subcontractor's subcontractor or materialman, or of materialman's materialman, to mechanic's lien, 24 A.L.R.4th 963

The doctrine of subrogation still finds its most frequent application where a guarantor or a surety[1] makes good the default of his principal, and on discharging the obligation of the principal, the surety is generally subrogated to the rights of a creditor or obligee,[2] and such right is not predicated upon a balancing of equities between principal and guarantor.[3] Where the surety pays amounts owed to subcontractors, laborers, or suppliers and is subrogated to the rights of those it has paid and to rights of those persons whose obligations the surety has discharged, in other words, the owner and contractor.[4]

Observation:

The right of a guarantor to pursue his subrogation rights is not dependent upon the contract or an assignment to him from the creditor; rather, the guarantor's subrogation rights result from the payment of the principal's debt.[5]

Although the right of a surety to subrogation exists independently of statute, there are statutes in some states defining the right.[6]

Generally speaking, a right to subrogation does not accrue in favor of a surety until the surety has performed its contractual obligation.[7] To maintain a claim for equitable subrogation, a surety must either take over contract performance or finance the completion of the defaulted contract under its performance bond.[8] Once the surety has fulfilled the defaulting contractor's obligations, it is subrogated to the rights of the contractor, insofar as it is due receivables, as well as materialmen and laborers who may have been paid by the surety, and the owner for whom a project was completed.[9] In other words, a surety, by completing a project on behalf of its defaulting principal, confers a benefit on the obligee and, therefore, steps into the shoes of the obligee.[10] This right of subrogation is not dependent on an assignment, lien, or contract, and as such, the surety's right of subrogation is not a security interest and is thus not subject to the filing requirements under the Uniform Commercial Code.[11]

Footnotes

1 Chemical Bank v. Meltzer, 93 N.Y.2d 296, 690 N.Y.S.2d 489, 712 N.E.2d 656 (1999) (stating that the court looks to the parties' intentions, as well as the respective roles of the parties and the nature of the transaction, in determining whether or not a suretyship relationship actually exists).

2 Pearlman v. Reliance Ins. Co., 371 U.S. 132, 83 S. Ct. 232, 9 L. Ed. 2d 190 (1962); In re Construction Alternatives, Inc., 2 F.3d 670 (6th Cir. 1993) (applying Ohio law); In re Doctors Hosp. of Hyde Park, Inc., 474 F.3d 421 (7th Cir. 2007); American Contractors Indem. Co. v. Saladino, 115 Cal. App. 4th 1262, 9 Cal. Rptr. 3d 835 (2d Dist. 2004); Payne v. Standard Acc. Ins. Co., 259 S.W.2d 491 (Ky. 1952); Reliance Ins. Co. v. City of Boston, 71 Mass. App. Ct. 550, 884 N.E.2d 524 (2008); Stevlee Factors, Inc. v. State, 136 N.J. Super. 461, 346 A.2d 624, 17 U.C.C. Rep. Serv. 1319 (Ch. Div. 1975), judgment aff'd, 144 N.J. Super. 346, 365 A.2d 713 (App. Div. 1976); North Star Reinsurance Corp. v. Continental Ins. Co., 82 N.Y.2d 281, 604 N.Y.S.2d 510, 624 N.E.2d 647 (1993).
Limited partners, as guarantors of a promissory note between a lender and a general partner, were equitably subrogated to the rights of lender under a deed of trust securing the note; following the general partner's default, the lender obtained judgment against the general partner and limited partners, and the limited partners paid almost $120,000 to the lender as guarantors on the note. Bradford Partners II, L.P. v. Fahning, 231 S.W.3d 513 (Tex. App. Dallas 2007).

3 Emprise Bank v. Rumisek, 42 Kan. App. 2d 498, 215 P.3d 621 (2009), review denied, (Sept. 7, 2010).
Balancing of equities, generally, see § 14.

4 In re Construction Alternatives, Inc., 2 F.3d 670 (6th Cir. 1993) (applying Ohio law).
A payment bond surety that discharges a contractor's obligation to pay a subcontractor is equitably subrogated to the rights of both the contractor and subcontractor. National American Ins. Co. v. U.S., 498 F.3d 1301 (Fed. Cir. 2007).

5 Bradford Partners II, L.P. v. Fahning, 231 S.W.3d 513 (Tex. App. Dallas 2007).

6 Mid-Continent Supply Co. v. Atkins & Potter Drilling Corp., 229 F.2d 68, 57 A.L.R.2d 849 (10th Cir. 1956); Western Surety Co. v. Walter, 44 S.D. 112, 182 N.W. 635, 24 A.L.R. 1519 (1921).
A surviving spouse who made payments pursuant to a guaranty agreement on a note executed by her deceased husband was entitled to reimbursement from the estate of the deceased under a statute giving a surety who makes payment on the principal debtor's note the right to sue for reimbursement. Liptrap v. Coyne, 196 N.C. App. 739, 675 S.E.2d 693 (2009), review denied, 363 N.C. 805, 690 S.E.2d 701 (2010).

7 U.S. v. Continental Casualty Co., 512 F.2d 475 (5th Cir. 1975); Reliance Ins. Co. v. U.S. Bank of Washington, N.A., 143 F.3d 502 (9th Cir. 1998); Fidelity & Deposit Co. of Maryland v. U.S., 31 Fed. Cl. 540 (1994).
A surety may subrogate to the rights of its principal under an insurance policy but only if the surety has paid the judgment or obligation of the principal which might be covered by the liability insurance. In re ML & Associates, Inc., 320 B.R. 109 (Bankr. N.D. Tex. 2005) (applying Texas law).
A payment and performance bond surety had not acquired subrogation rights against a contractor where the surety had not yet paid laborers and materialmen. Universal Bonding Ins. Co. v. Gittens and Sprinkle Enterprises, Inc., 960 F.2d 366 (3d Cir. 1992).

8 United Sur. and Indem. Co. v. U.S., 87 Fed. Cl. 580 (2009), aff'd, 403 Fed. Appx. 508 (Fed. Cir. 2010).

9 State Bank & Trust Co., Dallas v. Insurance Co. of the West, 132 F.3d 203, 34 U.C.C. Rep. Serv. 2d 577 (5th Cir. 1997); In re Construction Alternatives, Inc., 2 F.3d 670 (6th Cir. 1993) (applying Ohio law).

10 Acuity v. McGhee Engineering, Inc., 297 S.W.3d 718 (Tenn. Ct. App. 2008).

11 State Bank & Trust Co., Dallas v. Insurance Co. of the West, 132 F.3d 203, 34 U.C.C. Rep. Serv. 2d 577 (5th Cir. 1997); In re Larbar Corp., 177 F.3d 439, 1999 FED App. 0180P (6th Cir. 1999) (applying Kentucky law); Alaska State Bank v. General Ins. Co. of America, 579 P.2d 1362, 23 U.C.C. Rep. Serv. 466 (Alaska 1978); Mid-Continent Cas. Co. v. First Nat. Bank & Trust Co. of Chickasha, 1975 OK 18, 531 P.2d 1370, 16 U.C.C. Rep. Serv. 477 (Okla. 1975).

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B. Sureties and Guarantors

§ 39. Accrual, conditions, and elements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1), 8

A.L.R. Library

Insurance: subrogation of insurer compensating owner or contractor for loss under "builder's risk" policy against allegedly negligent contractor or subcontractor, 22 A.L.R.4th 701

A surety's right of subrogation out of funds taken in completion of a project for a defaulting contractor in no event exists beyond the extent necessary to reimburse itself for expenditures made in fulfilling its obligations on a bond.[1] The surety's right to reimbursement exists regardless of whether its bond is for performance or payment.[2] Additionally, where a surety is required to pay the claims of materialmen to complete a contract under which the contractor is in default, the fact that the contract is a "private works contract" rather than a "public works contract" does not preclude the surety from invoking subrogation.[3] Finally, the rule that a surety who has paid the debt of a principal is entitled to be substituted in place of the creditor as to all securities held by him for payment of debt applies whether the security being held is real or personal property.[4]

Upon payment of claims of labor and materialmen, a surety is entitled to assert the benefits of subrogation against sums retained by the public agency that contracted for the public work.[5]

The subrogation rights of the surety on a contractor's performance bonds begin on the date of the execution of the bond.[6] However, there is a different analysis which applies as to the surety's priority vis-a-vis other creditors.[7]

Practice Tip:

A surety by payment does not become ipso facto subrogated to the rights of the creditor but only acquires a right to such subrogation, and before the substitution or equitable assignment can actually take place, the surety must actively assert its equitable right through a valid judicial proceeding.[8]

CUMULATIVE SUPPLEMENT

Cases:

Negligence on the part of a surety does not invalidate the right to subrogate. Bilden Properties, LLC v. Birin, 75 A.3d 1143 (N.H. 2013), as modified on denial of reconsideration, (Sept. 30, 2013).

[END OF SUPPLEMENT]

Footnotes

1 Anderson v. U.S., 561 F.2d 162 (8th Cir. 1977); Transamerica Ins. Co. v. U.S., 989 F.2d 1188 (Fed. Cir. 1993); Home Ins. Co. v. U.S., 46 Fed. Cl. 160 (2000).

2 In re Larbar Corp., 177 F.3d 439, 1999 FED App. 0180P (6th Cir. 1999).

3 In re Modular Structures, Inc., 27 F.3d 72 (3d Cir. 1994) (applying New Jersey law); Mid-Continent Cas. Co. v. First Nat. Bank & Trust Co. of Chickasha, 1975 OK 18, 531 P.2d 1370, 16 U.C.C. Rep. Serv. 477 (Okla. 1975).

4 Aultman v. United Bank of Crawford, 259 Ga. 237, 378 S.E.2d 302, 9 U.C.C. Rep. Serv. 2d 161 (1989).

5 Ram Const. Co., Inc. v. American States Ins. Co., 749 F.2d 1049 (3d Cir. 1984).

6 In re Larbar Corp., 177 F.3d 439, 1999 FED App. 0180P (6th Cir. 1999); Equilease Corp. v. U. S. Fidelity & Guaranty Co., 262 Ark. 689, 565 S.W.2d 125 (1978); Finance Co. of America v. U.S. Fidelity & Guaranty Co., 277 Md. 177, 353 A.2d 249, 19 U.C.C. Rep. Serv. 267 (1976); State, for Use of National Sur. Corp. v. Malvaney, 221 Miss. 190, 72 So. 2d 424, 43 A.L.R.2d 1212 (1954); Third Nat. Bank in Nashville v. Highlands Ins. Co., 603 S.W.2d 730, 29 U.C.C. Rep. Serv. 1631 (Tenn. 1980).

7 International Fidelity Ins. Co. v. U.S., 949 F.2d 1042 (8th Cir. 1991) (applying Missouri law and holding a completing surety's lien on a contractor's progress payments did not relate back to the date of the suretyship agreement, and thus, the surety's claimed priority as against IRS tax liens depended upon the date of the contractor's default as the surety had priority as to IRS liens filed after the contractor defaulted but not as to an IRS lien filed before the contractor defaulted).

8 U.S. v. California, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993).

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§ 40. Compensated and gratuitous sureties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 6, 7(1)

In some cases, a surety who has been paid to assume the specific risk will be denied subrogation against a third party where the latter, though legally liable, was not guilty of negligence or of any active wrong.[1]

Footnotes

1 Bank of Fort Mill v. Lawyers Title Ins. Corp., 268 F.2d 313 (4th Cir. 1959); Unity Tel. Co. v. Design Service Co., 160 Me. 188, 201 A.2d 177 (1964).
Where subrogation was sought against a bank that was negligent in paying a forged instrument, it was held that the fact that the surety was compensated was to be considered, but was not determinative, and lost its significance in the light of the fact that the bank itself was compensated for its services through the use of its depositor's money. Hartford Acc. & Indem. Co. v. All Am. Nut Co., 220 Cal. App. 2d 545, 34 Cal. Rptr. 23 (2d Dist. 1963).

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B. Sureties and Guarantors

§ 41. Sureties of fiduciaries

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(4)

The surety of a fiduciary who makes good to the trust a default or breach of trust of the principal is subrogated to the rights of the trust against the principal and others who aided in the defalcation or breach of trust.[1]

Footnotes

1 American Nat. Bank of Macon v. Fidelity & Deposit Co. of Md., 129 Ga. 126, 58 S.E. 867 (1907); Western Cas. & Sur. Co. v. First State Bank of Bonne Terre, 390 S.W.2d 913 (Mo. Ct. App. 1965); U.S. Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S.W. 648 (1911).

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§ 42. Sureties on supersedeas or appeal bonds

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(9)

The main obligation of a surety on an appeal or supersedeas bond is to pay the judgment if affirmed, and upon payment, the surety is generally subrogated to the rights of the judgment creditor against the principal.[1]

Footnotes

1 Lee v. Threshermen's Mut. Ins. Co., 26 Wis. 2d 361, 132 N.W.2d 534 (1965).

73 Am. Jur. 2d Subrogation III C Refs.

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C. Payment of Taxes or Assessments

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 18

A.L.R. Library

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West's A.L.R. Digest, Subrogation 18

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C. Payment of Taxes or Assessments

1. In General

§ 43. Effect of statute on taxpayer's rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 18

A person who pays property taxes assessed on property owned by another may be entitled to subrogation to the taxing authority's lien either by statute or by express agreement.[1] However, other courts have declared that in the absence of statute, no such right of subrogation exists.[2] Yet, even the courts adopting this view hold that a lien in favor of one paying taxes for which another is liable arises in equity which will protect him under proper circumstances.[3]

However, there are limits to the rule, for example, if it is shown that the party making the payment knew that his payment or status was subordinate to superior tax liens.[4]

Footnotes

1 Bundren v. Holly Oaks Townhomes Ass'n, Inc., 347 S.W.3d 421 (Tex. App. Dallas 2011), reh'g overruled, (Sept. 12, 2011) and review denied, (Mar. 9, 2012).

2 Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W.2d 662, 147 A.L.R. 451 (1943).

3 Aetna Cas. & Sur. Co. v. Sherwood Distilling Co., 271 F. Supp. 381 (D. Md. 1967) (surety on distiller's bond); Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W.2d 662, 147 A.L.R. 451 (1943).

4 World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998) (holding the holder of notes and deeds of trust covering a development project was not entitled to equitable subrogation of the taxing authority's first priority lien after paying delinquent ad valorem taxes in light of its knowledge when

it purchased the notes and deeds that the notes were in default and that the development might be subject to tax liens).

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C. Payment of Taxes or Assessments

1. In General

§ 44. Mistake

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 18

A person paying taxes on the property of another by mistake is essentially in the same position as a volunteer, and if he has no interest in the property to be protected by such payment, he is generally not entitled to subrogation.[1] However, in some instances, subrogation has been allowed to one paying taxes under a mistake as to his ownership.[2] Since the strength of the equities is important, responsibility for the error may affect the result.[3]

Footnotes

1 Federal Land Bank of Louisville v. Dorman, 112 Ind. App. 111, 41 N.E.2d 661 (1942).
Volunteers, generally, see §§ 20, 21.

2 Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W.2d 662, 147 A.L.R. 451 (1943); Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So. 2d 175 (1943).

3 Coy v. Raabe, 69 Wash. 2d 346, 418 P.2d 728 (1966) (denying subrogation to a title insurance company that failed to find a record defect but allowing it to a purchaser who was entitled to rely on the expert opinion for which he paid).

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C. Payment of Taxes or Assessments

2. Payment by Particular Persons

§ 45. Contingent remaindermen

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 18

The rule that persons who for their own protection pay taxes on the property of another become subrogated to the rights of the State or other public body has been applied where taxes were contingent remaindermen[1] even if their interest is ephemeral and unlikely to vest.[2]

Footnotes

1 Riley v. Turpin, 47 Cal. 2d 152, 301 P.2d 834 (1956).

2 City of Richmond v. McKenny, 194 Va. 427, 73 S.E.2d 414 (1952).

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C. Payment of Taxes or Assessments

2. Payment by Particular Persons

§ 46. Vendors and purchasers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 18

Where the property is sold subject to a tax lien, the purchaser acquires no subrogation rights by paying the tax.[1]

Footnotes

1 Vonderahe v. Ortman, 128 Ind. App. 381, 146 N.E.2d 822 (1958).
Vendors and purchasers, generally, see §§ 48 to 50.

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C. Payment of Taxes or Assessments

2. Payment by Particular Persons

§ 47. Mortgagees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 18

Although there is contrary authority,[1] as a general rule, where a mortgagee pays the taxes on the mortgaged property to protect his interest and preserve the title from forfeiture to the State or to an individual tax purchaser, he will be subrogated to the lien of the State or other public body.[2]

Footnotes

1 Freeman v. New Smyrna Enterprises, Inc., 135 So. 2d 452 (Fla. 1st DCA 1961).

2 Gibson v. Western & S. Life Ins. Co., 161 Ky. 810, 171 S.W. 390 (1914); Wyoming Building & Loan Ass'n v. Mills Const. Co., 38 Wyo. 515, 269 P. 45, 60 A.L.R. 418 (1928).
Mortgages and encumbrances, generally, see §§ 51 to 59.

73 Am. Jur. 2d Subrogation III D Refs.

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D. Vendors and Purchasers

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West's Key Number Digest, Subrogation 14 to 18

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D. Vendors and Purchasers

§ 48. Rights of real property purchaser

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 14 to 18

A purchaser of real property must protect his interests by discharging all liens or encumbrances against the property, and in doing so, the courts generally agree that he should on principles of equity and justice be entitled to subrogation.[1] A consideration in awarding subrogation in such an instance is whether the denial of such subrogation will result in unjust enrichment of the debtor or his successor in right.[2] Accordingly, subrogation will be denied unless the purchaser shows that he has been forced, by the mortgagor's failure to pay his debt, to pay more than the value of the land to get a clear title.[3]

Although the purchaser is not technically a surety for the vendor, he occupies much the same position and is entitled to the same equities with respect to subrogation so far as they can be administered consistently with the rights of others.[4] An exception to this last rule would apply in the case where a lienholder agrees to compromise his lien.[5]

Footnotes

1 Commonwealth Bldg. & Loan Ass'n v. Martin, 185 Ark. 858, 49 S.W.2d 1046 (1932); McDermott v. Steck Co., 138 S.W.2d 1106 (Tex. Civ. App. Austin 1940), writ refused.

2 Haraway v. Sledge & Norfleet Co., 194 Miss. 133, 11 So. 2d 903, 145 A.L.R. 735 (1943), error overruled, 194 Miss. 133, 12 So. 2d 436 (1943).

3 Haraway v. Sledge & Norfleet Co., 194 Miss. 133, 11 So. 2d 903, 145 A.L.R. 735 (1943), error overruled, 194 Miss. 133, 12 So. 2d 436 (1943).

4 U.S. v. Avila, 88 F.3d 229 (3d Cir. 1996) (rejected on other grounds by, Joondeph v. Hicks, 235 P.3d 303 (Colo. 2010)) (holding purchasers of real property were derivatively equitably subrogated to senior lienholders whose liens were satisfied with the vendor's purchase money and without knowledge of a federal

tax lien although the purchasers acquired the property with knowledge of the federal tax lien); Evans v. Waguespack, 638 So. 2d 1153 (La. Ct. App. 1st Cir. 1994); Haraway v. Sledge & Norfleet Co., 194 Miss. 133, 11 So. 2d 903, 145 A.L.R. 735 (1943), error overruled, 194 Miss. 133, 12 So. 2d 436 (1943).

5 Dietrich Industries, Inc. v. U.S., 988 F.2d 568 (5th Cir. 1993) (applying Texas law and holding the fact that the purchaser did not pay the vendor's entire debt to the senior lienholder as part of purchase price did not preclude the purchaser's equitable subrogation to the lienholder's rights as the lienholder's rights would not be prejudiced by the purchaser's subrogation since the lienholder agreed to release its entire lien in exchange for a partial payment of the debt).

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D. Vendors and Purchasers

§ 49. Purchasers assuming encumbrances

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 14.1

Some courts have denied the right of subrogation to a purchaser discharging a prior lien or encumbrance as a full or part payment while a junior lien is of record.[1] This rule is justified on the ground that it makes it incumbent on the purchaser to search the records and minimizes the effect of any uncertainty as to what representations the vendor made regarding encumbrances.[2]

Footnotes

1 Tucker v. Holder, 359 Mo. 1039, 225 S.W.2d 123 (1949); Belcher v. Belcher, 161 Or. 341, 87 P.2d 762 (1939); Cheswick v. Weaver, 280 S.W.2d 942 (Tex. Civ. App. Beaumont 1955), writ refused n.r.e.

2 Belcher v. Belcher, 161 Or. 341, 87 P.2d 762 (1939).

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D. Vendors and Purchasers

§ 50. Purchasers at judicial or quasi-judicial sales

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 16

A.L.R. Library

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor, 33 A.L.R.4th 1206

The subrogation rights of purchasers at invalid judicial sales will be enforced.[1]

Footnotes

1 Dixon v. City Nat. Bank of Metropolis, 76 Ill. App. 3d 822, 32 Ill. Dec. 390, 395 N.E.2d 620 (5th Dist. 1979), judgment aff'd, 81 Ill. 2d 429, 43 Ill. Dec. 710, 410 N.E.2d 843 (1980) (holding where the proceeds of a void execution or judicial sale have been applied to satisfying a debt owing to a judgment creditor, the purchaser, who is therefore unable to take title to the property, becomes subrogated to the rights of the creditor against the debtor).

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E. Mortgages and Encumbrances

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 12, 14, 14.2, 17, 23(4), 27, 31(4)

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 12, 14, 14.2, 17, 23(4), 27, 31(4)

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E. Mortgages and Encumbrances

1. In General

a. Basic Considerations

§ 51. Paying or discharging encumbrance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 12

One who pays off a mortgage or encumbrance which the principal debtor has failed to discharge may be entitled to subrogation.[1]

Observation:

Partial subrogation to a mortgage is not permitted because it would have the effect of dividing the security between the original obligee and the subrogee, imposing unexpected burdens and potential complexities of division of the security and marshalling upon the original mortgagee.[2]

In other words, the doctrine of subrogation holds that where a person, other than the principal obligor, pays the mortgage indebtedness on land in which he has an interest, equity will substitute him in place of the original mortgagee and vest that mortgagee's rights in him; thus, he may keep alive and enforce the lien insofar as is necessary for his protection.[3] The mere

fact that the borrower used the proceeds of his loan to discharge a prior encumbrance is not sufficient to entitle the lender to subrogation; it must also appear that the loan was made for that purpose.[4]

Practice Tip:

Before equitable subrogation applies to give a new mortgage held by the subrogee who used the proceeds of the new mortgage to extinguish the earlier mortgage and assent to the priority once given to the earlier mortgage, the court must determine that: (1) the subrogee made payment to protect his or her own interest, (2) the subrogee did not act as volunteer, (3) the subrogee was not primarily liable for the debt paid, (4) the subrogee paid off the entire encumbrance, and (5) subrogation would not work any injustice to the rights of a junior mortgage holder; however, depending on an individual case, subrogation may be awarded even where one or more of factors is absent.[5]

CUMULATIVE SUPPLEMENT

Cases:

Partial subrogation to a mortgage is not permitted, because it would have the effect of dividing the security between the original obligee and the subrogee, imposing unexpected burdens and potential complexities of division of the security and marshaling upon the original mortgagee. Weitz Co. L.L.C. v. Heth, 333 P.3d 23 (Ariz. 2014).

In the context of refinancing of mortgage loans, subrogation rights are available only to the extent that the refinanced loan proceeds were actually used to pay off the prior mortgages. Eastern Sav. Bank, FSB v. CACH, LLC, 55 A.3d 344 (Del. 2012).

[END OF SUPPLEMENT]

Footnotes

1 Mort v. U.S., 86 F.3d 890 (9th Cir. 1996); Carter v. Carter, 251 Ala. 598, 38 So. 2d 557 (1948); Krebs v. Bezler, 338 Mo. 365, 89 S.W.2d 935, 103 A.L.R. 1177 (1936); Martin v. Hickenlooper, 90 Utah 150, 59 P.2d 1139, 107 A.L.R. 762 (1936).

2 Bank of America, N.A. v. Ping, 879 N.E.2d 665 (Ind. Ct. App. 2008).

3 Richards v. Suckle, 871 S.W.2d 239 (Tex. App. Houston 14th Dist. 1994).

4 U.S. v. Fidelity & Deposit Co. of Md., 214 F.2d 565 (5th Cir. 1954); Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955).

5 East Boston Sav. Bank v. Ogan, 428 Mass. 327, 701 N.E.2d 331 (1998).
Classes of persons entitled to subrogation, generally, see §§ 19 to 22.
Payments necessary to support subrogation, generally, see §§ 23 to 28.

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E. Mortgages and Encumbrances

1. In General

a. Basic Considerations

§ 52. Agreement for subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 27

A third person paying off or furnishing money to pay off an encumbrance on property may acquire the right of subrogation by virtue of an agreement to that effect.[1] Even if a party does not claim secondary liability or payment to protect its own interests, it may claim equitable subrogation to a priority position based on an agreement between the parties that the lender will have security.[2]

However, no agreement for subrogation will be implied unless the evidence shows that the lender believed in good faith that he was to have security of equal dignity and position with that discharged.[3]

Footnotes

1 Boley v. Daniel, 72 Fla. 121, 72 So. 644 (1916); Smith v. Sprague, 244 Mich. 577, 222 N.W. 207 (1928).

2 Ocwen Loan Servicing, LLC v. Williams, 305 Wis. 2d 772, 2007 WI App 229, 741 N.W.2d 474 (Ct. App. 2007).

3 Southwest Title & Trust Co. v. Norman Lumber Co., 1968 OK 71, 441 P.2d 430 (Okla. 1968).

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E. Mortgages and Encumbrances

1. In General

a. Basic Considerations

§ 53. Interest of party paying or discharging encumbrance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 12

Following from the general rule that subrogation will not be allowed to a third person who without any obligation so to do pays an indebtedness—a rule which applies equally to debt secured by a mortgage—one who, having no interest to protect, voluntarily pays off or lends money to pay off an encumbrance without taking an assignment thereof, and without an agreement for substitution, cannot invoke the doctrine of subrogation unless fraud, mistake, or some other consideration is shown.[1] However, if the party does have an interest in the property, he may pay it or lend his money for that purpose and be subrogated to the rights of the creditor.[2]

Equitable subrogation should not be precluded on the basis that the party seeking subrogation is a purchaser of property who has paid the existing encumbrance in connection with the purchase even though the purchaser's interest did not preexist the purchase, and the purchasers' funds were paid first into escrow and then distributed to the lienholder; in paying off the encumbrance, a purchaser is protecting his or her concurrently acquired interest by ensuring clear title to the property and is therefore not a mere volunteer.[3] Additionally, a future or contingent interest will suffice.[4]

Footnotes

1 Lentz v. Stoflet, 280 Mich. 446, 273 N.W. 763 (1937); Southwest Title & Trust Co. v. Norman Lumber Co., 1968 OK 71, 441 P.2d 430 (Okla. 1968); Home Owners' Loan Corp. v. Crouse, 151 Pa. Super. 259, 30 A.2d 330 (1943).

Classes of persons entitled to subrogation, generally, see §§ 19 to 22.

One who makes a loan to discharge a first mortgage, pursuant to an agreement with the mortgagor that he shall have a first mortgage on the same lands to secure it, will be subrogated to the rights of the first mortgagee; the failure of the lender to secure a formal assignment will not bar such subrogation. Southern Colonial Mortg. Co., Inc. v. Medeiros, 347 So. 2d 736 (Fla. 4th DCA 1977).

2 Carter v. Carter, 251 Ala. 598, 38 So. 2d 557 (1948); Parsons v. Urie, 104 Md. 238, 64 A. 927 (1906); Krebs v. Bezler, 338 Mo. 365, 89 S.W.2d 935, 103 A.L.R. 1177 (1936).

3 Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 258 P.3d 281 (Ct. App. Div. 1 2011), review granted, (Nov. 29, 2011) and opinion aff'd, 2012 WL 1138251 (Ariz. 2012).

4 Furlong v. Leybourne, 171 So. 2d 1 (Fla. 1964).

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E. Mortgages and Encumbrances

1. In General

b. Invalid or Defective Security

§ 54. Effect of invalid security

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 23(4)

There are many cases where the security taken for a loan turns out to be invalid, and in that instance, the party advancing the money will be subrogated to the rights of the holder of the lien which the money is used to discharge.[1] Mere negligence of the one seeking subrogation in failing to procure a properly executed mortgage will not, at least in the absence of intervening equities, defeat his right to subrogation.[2]

Footnotes

1 Davis v. Johnson, 241 Ga. 436, 246 S.E.2d 297 (1978); Katter v. Rodgers, 1924 OK 674, 107 Okla. 116, 230 P. 500 (1924).

2 Home Owners' Loan Corp. v. Papara, 241 Wis. 112, 3 N.W.2d 730, 140 A.L.R. 1289 (1942).
Neglect as bar to subrogation, generally, see § 17.

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1. In General

b. Invalid or Defective Security

§ 55. Failure of mortgagor's title

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 23(4)

A.L.R. Library

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor, 33 A.L.R.4th 1206

Generally, where one has in good faith lent money to another upon the security of a mortgage for the purpose of discharging a prior valid lien upon property which is completely titled in the borrower, the lender, upon the failure of his mortgagor's title or upon disclosure of a concealed condition, is entitled to subrogation either to the rights of the prior lienholder or to whatever rights the mortgagor may have against the persons claiming total or partial title to the property.[1] This principle has been applied in cases involving a complete failure of the mortgagor's title.[2] Innocence of the mortgagee in making the loan is a necessary condition of his right to equitable relief against the true owner under such circumstances.[3]

Footnotes

1 Gladowski v. Felczak, 346 Pa. 660, 31 A.2d 718, 151 A.L.R. 418 (1943); Hughes v. Thomas, 131 Wis. 315, 111 N.W. 474 (1907).

2 Gladowski v. Felczak, 346 Pa. 660, 31 A.2d 718, 151 A.L.R. 418 (1943).

3 Gladowski v. Felczak, 346 Pa. 660, 31 A.2d 718, 151 A.L.R. 418 (1943).

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1. In General

b. Invalid or Defective Security

§ 56. Junior encumbrancers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 17

The holder of a junior mortgage or encumbrance who pays or advances money to pay the debt secured by the prior mortgage or encumbrance is generally entitled to be subrogated to the rights of the senior encumbrancer.[1] This is the case even if where the junior lienholder does not take an assignment from the senior lienholder.[2] This rule is particularly important where a foreclosure of a senior lien will erase the security interest of a junior lien; thus, at the threat of foreclosure, a junior lienor is entitled, even without express contractual authority, to reinstate the loan by making a payment sufficient to cure the default or to pay off the senior lien and become subrogated to the rights of the senior lienholder as against the owner of the property.[3]

Observation:

For purposes of determining whether equitable subrogation restores original priority to a junior creditor, the courts consider whether the junior creditor is favored by paramount equities that justify subordinating the senior creditor's security interest which often turns on whether the junior creditor detrimentally relied on the apparent discharge of the senior encumbrance.[4]

Footnotes

1 Dietrich Industries, Inc. v. U.S., 988 F.2d 568 (5th Cir. 1993) (applying Texas law); In re Deuel, 594 F.3d 1073 (9th Cir. 2010), cert. denied, 131 S. Ct. 85, 178 L. Ed. 2d 27 (2010); Strike v. Trans-West Discount Corp., 92 Cal. App. 3d 735, 155 Cal. Rptr. 132 (4th Dist. 1979); Trueman Fertilizer Co. v. Allison, 81 So. 2d 734 (Fla. 1955); MGIC Financial Corp. v. H. A. Briggs Co., 24 Wash. App. 1, 600 P.2d 573 (Div. 2 1979).

2 Strike v. Trans-West Discount Corp., 92 Cal. App. 3d 735, 155 Cal. Rptr. 132 (4th Dist. 1979).

3 Pacific Trust Co. Ttee v. Fidelity Fed. Sav. & Loan Assn., 184 Cal. App. 3d 817, 229 Cal. Rptr. 269 (6th Dist. 1986).

4 Rush v. Alaska Mortg. Group, 937 P.2d 647 (Alaska 1997).

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1. In General

b. Invalid or Defective Security

§ 57. Purchasers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 14

Subrogation may be granted to purchasers who pay off liens or encumbrances on the property acquired by them.[1] However, subrogation does not apply against a bona fide purchaser who purchases without knowledge of a lien.[2]

Footnotes

1 Dietrich Industries, Inc. v. U.S., 988 F.2d 568 (5th Cir. 1993) (applying Texas law).

2 In re Zaptocky, 250 F.3d 1020, 2001 FED App. 0167P (6th Cir. 2001) (applying Ohio law).

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2. Subrogation to Original Lien Against Intervening Liens

§ 58. Equitable subrogation applied

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 31(4)

Under the doctrine of equitable subrogation, where fairness and justice require, one who advances money to discharge a prior lien on real or personal property and takes a new mortgage as security is entitled to be subrogated to the rights under the prior lien against the holder of an intervening lien of which he was ignorant.[1] However, the fact that the subrogee has actual or constructive knowledge of an intervening mortgage will not automatically prevent subrogation because the courts also look to equity to decide if subrogation should be recognized and must determine, under the circumstances, if the subrogee acted with sufficient knowledge to merit denying subrogation where it would otherwise be the correct result.[2] The doctrine of equitable subrogation provides an exception to the first in time, first in right rule in determining priority of multiple mortgage interests in a property.[3] Equitable subrogation acts as an exception to modern recording statutes and enables a later-filed lienholder to leap-frog over an intervening lienholder.[4] In other words, under the doctrine of equitable subrogation, a lender steps into the shoes of the mortgagee that it has paid off and receives that mortgagee's priority over subsequent liens.[5]

Definition:

The term "intervening lienholder" means intervening in sequence when there has been a prior lien and then an intervening lien followed by the release of the prior lien and the creation of a new lien in favor of the party who paid for the release of the prior lien; excluded from this concept is the sequence when there has been a prior lien, release of the prior lien, a lien in favor of some third party, and then the creation of a lien in favor of the party who paid for the release of the prior lien.[6]

In considering whether to order subrogation and, thus, bypass the general principle of priority, courts base their decisions on the equities, particularly the avoidance of windfalls and the absence of any prejudice to the interests of junior lienholders.[7] In other words, subrogation of a prior lienholder's priority rights is a matter of pure equity and will not be enforced when it would work an injustice to the rights of those having equal equities;[8] equitable subrogation should never be allowed if a junior interest is materially prejudiced.[9] A determination of what constitutes "prejudice" to a prior lienholder is confined to what would constitute prejudice in the event of a foreclosure as the position of a lienholder has no meaning unless and until a foreclosure action is initiated.[10] For purposes of an analysis of equitable subrogation issue, a junior lienholder does not suffer prejudice merely because it is not elevated in priority.[11] In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior encumbrance.[12]

CUMULATIVE SUPPLEMENT

Cases:

Under Arkansas law, the equitable subrogation doctrine applies when a lender advances money to pay off an incumbrance on realty at the request of the landowner with the understanding that the advance will be secured by a first lien on the property; in the event the new security is, for any reason, not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior lienholder, and to this end equity will set aside a cancellation of such security, and revive the same. In re Francis, 750 F.3d 754 (8th Cir. 2014).

Under Oregon law, hard money lender's reliance on defective preliminary title report without informing title company that report was missing Farm Service Agency's (FSA) first-priority lien on mortgagors' home property prior to lending mortgagors $250,000 secured by 10.5-acre parcel of land on which their home and cranberry bogs were located was not commercially reasonable, thus constituting lack of due diligence amounting to inexcusable negligence that precluded equitable subrogation to place lender's second-position lien in front of FSA's first-position lien on home property, where industry standard called for lender to immediately notify title company or escrow agent upon discovery of error on preliminary title report. Boresek v. U.S. Dept. of Agriculture, 109 F. Supp. 3d 1338 (D. Or. 2015).

Under Oregon's doctrine of equitable subrogation, if the holder of a mortgage takes a new mortgage as a substitute for a former one, and cancels and releases the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage and give it its original priority. Boresek v. U.S. Dept. of Agriculture, 109 F. Supp. 3d 1338 (D. Or. 2015).

Under Florida law, doctrine of equitable subrogation allows subsequent lender, who has satisfied an existing mortgage lien, to assume priority position of lien which it has satisfied, notwithstanding provisions of the Florida recording statute. West's F.S.A. § 695.01. In re Judd, 471 B.R. 830 (D.S.C. 2012).

Equitable subrogation did not apply to allow mortgagee, which provided refinancing loan to pay off pre-existing mortgage, to step into original mortgagee's shoes and take priority over recorded judgment lien, absent any other equitable reason; judgment lien issue would have been avoided or revealed with a proper search, mortgagee had adequate legal remedy of pursuing claim against title company, application of equitable subrogation would place judgment lien holder in worse position, as refinancing

left mortgagor debtor further in debt, and lien holder did not bargain for its subordinate position to original mortgage. 25 Del. Code § 2106. Eastern Savings Bank, FSB v. Cach, LLC, 124 A.3d 585 (Del. 2015).

Prejudice to other mortgagee precluded equitable subrogation of lender, after lender paid off its own prior mortgage loan on property with proceeds of new loan by same lender, to extent of other mortgagee's recorded mortgage, where other mortgagee's recorded mortgage included a due-on-sale provision and was senior to second loan by lender, and loan proceeds of that second loan could have been, but were not, used to pay off other mortgagee's recorded mortgage. Nikooie v. JPMorgan Chase Bank, N.A., 183 So. 3d 424 (Fla. 3d DCA 2014).

Equitable subrogation permits a third party lender to inherit, in full or in part, the original lien position of the mortgage that it paid off, even if an intervening lien existed in the meantime. Sovereign Bank v. Gillis, 432 N.J. Super. 36, 74 A.3d 1 (App. Div. 2013).

Lender was entitled to equitable subrogation, where $461,127 of proceeds of subject loan were used to satisfy prior note and mortgage for which borrower was responsible. Carver Federal Savings Bank v. Baptiste, 180 A.D.3d 748, 118 N.Y.S.3d 667 (2d Dep't 2020).

Under state law, a lender who discharges a prior, valid lien on borrower's homestead property is entitled to subrogation, even if the lender failed to correct a curable defect in the loan documents under constitutional provision governing types of debt that may be secured by a lien on homestead. Tex. Const. art. 16, § 50. Federal Home Loan Mortgage Corporation v. Zepeda, 601 S.W.3d 763 (Tex. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Equicredit Corp. of Connecticut v. Kasper, 122 Conn. App. 94, 996 A.2d 1243 (2010), appeal denied, 298 Conn. 916, 4 A.3d 831 (2010); Egeli v. Wachovia Bank, N.A., 184 Md. App. 253, 965 A.2d 87 (2009); Wells Fargo Bank v. National Lumber Co., 76 Mass. App. Ct. 1, 918 N.E.2d 835 (2009); U.S. Bank Nat. Ass'n v. Hylton, 403 N.J. Super. 630, 959 A.2d 1239 (Ch. Div. 2008); Gerow v. Sinay, 28 Misc. 3d 990, 905 N.Y.S.2d 827 (Sup 2010).

2 HSBC Bank USA, N.A. v. Mendoza, 11 A.3d 229 (D.C. 2010) (constructive notice of the existence of the junior liens); Baxter v. Bayview Loan Servicing, LLC, 301 Ga. App. 577, 688 S.E.2d 363 (2009) (knowledge of the existence of an intervening encumbrance will not alone prevent the person advancing the money to pay off the senior encumbrance from claiming the right of subrogation where the exercise of such right will not in any substantial way prejudice the rights of the intervening encumbrancer); East Boston Sav. Bank v. Ogan, 428 Mass. 327, 701 N.E.2d 331 (1998).

A subsequent creditor's knowledge, actual or constructive, of an intervening lien is irrelevant in deciding whether equitable subrogation should apply to place the subsequent creditor in primary position. Continental Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC, 227 Ariz. 382, 258 P.3d 200 (Ct. App. Div. 2 2011), as corrected, (June 1, 2011).

Application of the "equitable subrogation" doctrine allows someone who pays off a primary and superior encumbrance to be substituted into the priority position of the primary lienholder despite recordation of an intervening lien. Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 258 P.3d 281 (Ct. App. Div. 1 2011), review granted, (Nov. 29, 2011) and opinion aff'd, 2012 WL 1138251 (Ariz. 2012).

A refinancing lender's constructive notice of an intervening lien does not bar the application of equitable subrogation unless the rights of the intervening lienholder are violated. Aurora Loan Services LLC v. Senchuk, 36 So. 3d 716 (Fla. 1st DCA 2010).

3 Equicredit Corp. of Connecticut v. Kasper, 122 Conn. App. 94, 996 A.2d 1243 (2010), appeal denied, 298 Conn. 916, 4 A.3d 831 (2010); Wells Fargo Bank v. National Lumber Co., 76 Mass. App. Ct. 1, 918 N.E.2d 835 (2009).

Equitable subrogation provides an exception to the first-in-time rule by permitting a person who pays off an encumbrance to assume the same lien priority position as the holder of the previous encumbrance. First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC, 161 Wash. App. 474, 254 P.3d 835 (Div. 1 2011).

While the priority of a lien is generally determined by the date it was recorded, the doctrine of equitable subrogation is an exception to this "first in time" rule. 1313466 Ontario, Inc. v. Carr, 2008 PA Super 135, 954 A.2d 1 (2008).

4 American Sterling Bank v. Johnny Management LV, Inc., 245 P.3d 535, 126 Nev. Adv. Op. No. 41 (Nev. 2010); Wells Fargo Bank, Minnesota, N.A. v. Com., Finance and Admin., Dept. of Revenue, 345 S.W.3d 800 (Ky. 2011), as corrected, (Aug. 25, 2011).

5 OneWest Bank, FSB v. Marshall, 18 A.3d 715 (D.C. 2011); Aurora Loan Services LLC v. Senchuk, 36 So. 3d 716 (Fla. 1st DCA 2010); Secured Equity Financial, LLC v. Washington Mut. Bank, F.A., 293 Ga. App. 50, 666 S.E.2d 554 (2008); LaSalle Bank Nat. Ass'n v. White, 246 S.W.3d 616 (Tex. 2007).

6 G.E. Capital Mortg. Services, Inc. v. Levenson, 338 Md. 227, 657 A.2d 1170 (1995).

7 Neu v. Gibson, 928 N.E.2d 556 (Ind. 2010).

8 Hicks v. Joondeph, 205 P.3d 432 (Colo. App. 2008), aff'd, 235 P.3d 303 (Colo. 2010).

9 First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC, 161 Wash. App. 474, 254 P.3d 835 (Div. 1 2011).

10 Aurora Loan Services LLC v. Senchuk, 36 So. 3d 716 (Fla. 1st DCA 2010).

11 Bank of America v. Babu, 340 S.W.3d 917 (Tex. App. Dallas 2011), reh'g overruled, (June 21, 2011) and rule 53.7(f) motion granted, (Sept. 14, 2011).

12 Gerow v. Sinay, 28 Misc. 3d 990, 905 N.Y.S.2d 827 (Sup 2010).

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III. Applications of Doctrine

E. Mortgages and Encumbrances

2. Subrogation to Original Lien Against Intervening Liens

§ 59. Negligence of lender; failure to discover liens of record

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 14.2

A lender's negligence and improper business maneuvers may act to remove an equitable remedy that would otherwise entitle it to a priority lien.[1] Although constructive and even actual knowledge of the lien is not necessarily fatal to a claim, the degree of knowledge attributable to a subrogee concerning the existence of the intervening mortgage may nullify equitable subrogation;[2] the classic formulation is that the purchaser's right of subrogation to the mortgage that he or she discharged includes its priority over junior liens of which he or she did not have actual knowledge and where he or she was not culpably negligent in failing to learn of the junior lien.[3] A mortgagee who is aware and does not take reasonable steps to determine whether there is possibility of another mortgage or lien against property is not entitled to equitable subrogation where due diligence by the mortgagee could have revealed existence of the lenders' recorded mortgage.[4]

However, it has also been held that equitable subrogation of a new mortgagee that stepped into the shoes of an older mortgagee may still be afforded even though lack of knowledge of intervening mortgagees on the part of the new mortgagee occurs as a result of negligence.[5]

Footnotes

1 Countrywide Home Loans, Inc. v. BancFirst, 2011 OK CIV APP 111, 264 P.3d 1262 (Div. 1 2011), cert. denied, (Oct. 10, 2011).

2 Wells Fargo Bank v. National Lumber Co., 76 Mass. App. Ct. 1, 918 N.E.2d 835 (2009).

A factor a court may consider in conducting a balancing test for a claim of equitable subrogation includes, inter alia, whether that party had notice of the intervening lien. Bank of America v. Babu, 340 S.W.3d 917 (Tex. App. Dallas 2011), reh'g overruled, (June 21, 2011) and rule 53.7(f) motion granted, (Sept. 14, 2011).

3 JPMorgan Chase Bank v. Howell, 883 N.E.2d 106 (Ind. Ct. App. 2007).

4 Gerow v. Sinay, 28 Misc. 3d 990, 905 N.Y.S.2d 827 (Sup 2010).

Mortgagees were not entitled to the application of equitable subrogation in order to allow them to leap-frog previously filed general tax liens and take a priority position in a foreclosure action where the title insurers for the mortgagees failed to identify a properly recorded tax liens that could have been easily discovered had due diligence been done. Wells Fargo Bank, Minnesota, N.A. v. Com., Finance and Admin., Dept. of Revenue, 345 S.W.3d 800 (Ky. 2011), as corrected, (Aug. 25, 2011).

Evidence did not support a trial court's finding of due diligence on the part of a mortgagee in checking property records at the time a mortgage was executed, and thus, the doctrine of equitable subrogation did not apply to make the mortgage senior to a judgment creditor's lien on property, in the mortgagee's foreclosure action, even though the judgment creditor's lien was recorded after the mortgage was executed, where the mortgagee presented no evidence to excuse and offered no explanation for its predecessor-in-interest's failure to discover the judgment, which was a public record, and for its four-week delay in recording the mortgage. Deutsche Bank Natl. Trust Co. v. Boswell, 192 Ohio App. 3d 374, 2011-Ohio-673, 949 N.E.2d 96 (1st Dist. Hamilton County 2011).

5 U.S. Bank Nat. Ass'n v. Hylton, 403 N.J. Super. 630, 959 A.2d 1239 (Ch. Div. 2008).

A mortgagee's mortgage was entitled to priority over a judgment lien filed by a judgment creditor, even though the judgment lien was recorded before the mortgage, pursuant to the doctrine of equitable subrogation; even though the title company hired by the mortgagee was negligent in failing to discover the judgment lien, more than simple negligence was required to preclude the operation of the doctrine of equitable subrogation, and the judgment creditor failed to establish that the mortgagee was culpably negligent in failing to discover the judgment lien. Foster v. Porter Bridge Loan Co., Inc., 27 So. 3d 481 (Ala. 2009).

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73 Am. Jur. 2d Subrogation IV Refs.

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Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 1, 7(1), 33(1), 33(2)

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 1, 7(1), 33(1), 33(2)

Forms

Am. Jur. Legal Forms 2d § 241:10

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§ 60. Full substitution of party

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 1

Subrogation contemplates full substitution.[1] The party subrogated acquires all the rights, securities, and remedies that the creditor has against the debtor who is primarily liable.[2]

The equitable doctrine of subrogation places the subrogee in the precise position of the one whose rights are subrogated;[3] the rights to which the subrogee succeeds are the same as, but no greater than, those of the person for whom he is substituted—he cannot acquire any claim, security, or remedy that the subrogor did not have.[4] Furthermore, a subrogated claim is not in any way diminished or extinguished by the subrogation; it is merely taken over by another who stands in the place of the original claimant.[5] In other words, a subrogee cannot accede to a right not possessed by the subrogor.[6] Moreover, the rights, claims, and securities to which he succeeds are taken subject to the limitations, burdens, and disqualifications incident to them in the hands of the party to whom he is subrogated.[7] The right to be subrogated arises from the relationship of the parties and does not depend on contract or statute for its application.[8]

Observation:

Subrogation has two features: the first is the right to reimbursement, and the second is the mechanism for the enforcement of the right.[9]

Footnotes

1 Egros v. Pempton, 588 So. 2d 1139 (La. Ct. App. 1st Cir. 1991), writ granted, 595 So. 2d 643 (La. 1992) and judgment aff'd, 606 So. 2d 780 (La. 1992); Riemer v. Columbia Medical Plan, Inc., 358 Md. 222, 747 A.2d 677 (2000); Metmor Financial, Inc. v. Landoll Corp., 976 S.W.2d 454 (Mo. Ct. App. W.D. 1998), retransferred to Mo. Ct. of Appeals, (Oct. 20, 1998) and opinion adopted and reinstated after retransfer, (Oct. 26, 1998); Brockhaus v. Lambert, 259 Neb. 160, 608 N.W.2d 588 (2000); Dairyland Ins. Co. v. Herman, 1998-NMSC-005, 124 N.M. 624, 954 P.2d 56 (1997); Pep'e v. McCarthy, 249 A.D.2d 286, 672 N.Y.S.2d 350 (2d Dep't 1998); Blue Cross & Blue Shield Mut. of Ohio v. Hrenko, 72 Ohio St. 3d 120, 1995-Ohio-306, 647 N.E.2d 1358 (1995); Hawkins v. Gadoury, 713 A.2d 799 (R.I. 1998); Blankenship v. Estate of Bain, 5 S.W.3d 647 (Tenn. 1999).

"Subrogation" is the substitution of another person in the place of a creditor so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. Sourcecorp, Inc. v. Norcutt, 227 Ariz. 463, 258 P.3d 281 (Ct. App. Div. 1 2011), review granted, (Nov. 29, 2011) and opinion aff'd, 2012 WL 1138251 (Ariz. 2012).

Under "equitable subrogation," when a person has discharged the debt of another with respect to real property, that person may, when justice requires, be substituted in place of a prior encumbrancer and treated as an equitable assignee of the lien; in other words, that person may be substituted to the rights and position of the prior creditor. Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274 (Minn. 2010).

2 Davis v. Southern Farm Bureau Cas. Ins. Co., 231 Ark. 211, 330 S.W.2d 276 (1959); Aurora Loan Services LLC v. Senchuk, 36 So. 3d 716 (Fla. 1st DCA 2010); Egros v. Pempton, 588 So. 2d 1139 (La. Ct. App. 1st Cir. 1991), writ granted, 595 So. 2d 643 (La. 1992) and judgment aff'd, 606 So. 2d 780 (La. 1992); American Nat. Ins. Co. v. U. S. Fidelity & Guaranty Co., 215 So. 2d 245 (Miss. 1968); Brockhaus v. Lambert, 259 Neb. 160, 608 N.W.2d 588 (2000); Dairyland Ins. Co. v. Herman, 1998-NMSC-005, 124 N.M. 624, 954 P.2d 56 (1997); Bank of America v. Babu, 340 S.W.3d 917 (Tex. App. Dallas 2011), reh'g overruled, (June 21, 2011) and rule 53.7(f) motion granted, (Sept. 14, 2011).

The assignee or subrogee owns the substantive right of the claimant. La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya, 533 F.3d 837 (D.C. Cir. 2008).

Subrogation arises from the discharge of a debt and permits the party paying off a creditor to succeed to the creditor's rights in relation to the debt. Bank of America, N.A. v. Ping, 879 N.E.2d 665 (Ind. Ct. App. 2008).

3 Ario v. Reliance Ins. Co., 602 Pa. 490, 980 A.2d 588 (2009).

4 Bierman v. Hunter, 190 Md. App. 250, 988 A.2d 530 (2010); Washington Fire & Marine Ins. Co. v. Williamson, 233 Miss. 33, 100 So. 2d 852 (1958); American Ins. Group v. McCowin, 7 Ohio App. 2d 62, 36 Ohio Op. 2d 153, 218 N.E.2d 746 (7th Dist. Trumbull County 1966); Anchor Cas. Co. v. Robertson Transport Co., 389 S.W.2d 135 (Tex. Civ. App. Corpus Christi 1965), writ refused n.r.e., (June 23, 1965); Heritage Mut. Ins. Co. v. Truck Ins. Exchange, 184 Wis. 2d 247, 516 N.W.2d 8 (Ct. App. 1994).

A subrogee gains no additional rights. Feigenbaum v. Guaracini, 402 N.J. Super. 7, 952 A.2d 511 (App. Div. 2008).

5 Pep'e v. McCarthy, 249 A.D.2d 286, 672 N.Y.S.2d 350 (2d Dep't 1998).

6 Ohio Mut. Ins. Assn., United Ohio Ins. Co. v. Warlaumont, 124 Ohio App. 3d 473, 706 N.E.2d 793 (12th Dist. Brown County 1997).

7 Standard Acc. Ins. Co. v. Pellecchia, 15 N.J. 162, 104 A.2d 288 (1954); Totsky v. Riteway Bus Service, Inc., 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637 (2000).

8 American Ins. Co. v. Ohio Bur. of Workers Comp., 62 Ohio App. 3d 921, 577 N.E.2d 756 (10th Dist. Franklin County 1991).

9 Community Ass'n Underwriters of America, Inc. v. Kalles, 164 Wash. App. 30, 259 P.3d 1154 (Div. 2 2011).

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IV. Effect of Subrogation and Rights Acquired

§ 61. Rights and remedies against third persons

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1)

A.L.R. Library

Lessee's right of subrogation in respect of lien superior to his lease, 1 A.L.R.2d 286

A surety or other person, on becoming subrogated, is entitled not only to the rights and remedies of the creditor against the principal but may also be subrogated to the rights and remedies of the creditor against third persons to compel payment of the debt.[1] However, the insurer is not subrogated to collateral contract rights that the insured has against a third person who did not cause the loss.[2]

The right to recover from a third person, however, does not stand on the same footing as the right to recover from the principal—as to the latter, the right is absolute; as to the former, it is conditional.[3] Since the purpose of subrogation is to compel the payment of the debt by the one who in good conscience should pay it, it will generally not be allowed against a third person whose equities are equal or superior to those of the surety in respect to the same liability.[4] Thus, subrogation will be allowed against third persons whose negligence or wilful conduct has made them liable to the creditor for the same default as the principal.[5] However, where a surety's action in subrogation against a third party is based on the third party's contractual liability to the insured, some cases require the surety to show that his equities are superior to those of the third party.[6] Subrogation will be denied if either the surety or the insured was guilty of unconscionable conduct;[7] yet some courts permit subrogation in this situation even though the equities of the surety and the third party may be considered equal.[8]

Footnotes

1 Kansas City Title & Trust Co. v. Fourth Nat. Bank in Wichita, Kan., 135 Kan. 414, 10 P.2d 896, 87 A.L.R. 334 (1932); Pep'e v. McCarthy, 249 A.D.2d 286, 672 N.Y.S.2d 350 (2d Dep't 1998); U.S. Fidelity & Guaranty Co. v. U.S. Nat. Bank of Eugene, 80 Or. 361, 157 P. 155 (1916).

2 Board of Trustees of First Congregational Church of Austin v. Cream City Mut. Ins. Co. of Milwaukee, Wis., 255 Minn. 347, 96 N.W.2d 690 (1959).

3 Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N.W. 265, 4 A.L.R. 510 (1919); York v. Sevier County Ambulance Authority, 8 S.W.3d 616 (Tenn. 1999).

4 Southern Sur. Co. v. Tessum, 178 Minn. 495, 228 N.W. 326, 66 A.L.R. 1136 (1929); Security Fence Co. v. Manchester Federal Sav. & Loan Ass'n, 101 N.H. 190, 136 A.2d 910 (1957); U.S. Fidelity & Guaranty Co. v. First Nat. Bank of S. C. of Columbia, 244 S.C. 436, 137 S.E.2d 582 (1964).

5 Maryland Cas. Co. v. Gough, 146 Ohio St. 305, 32 Ohio Op. 365, 65 N.E.2d 858 (1946).

6 U.S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, Tex., 172 F.2d 258 (5th Cir. 1949); Meyers v. Bank of America Nat. Trust & Savings Ass'n, 11 Cal. 2d 92, 77 P.2d 1084 (1938).

7 Standard Acc. Ins. Co. v. Pellecchia, 15 N.J. 162, 104 A.2d 288 (1954).

8 Unity Tel. Co. v. Design Service Co., 160 Me. 188, 201 A.2d 177 (1964).

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§ 62. Subrogation to original obligation or debt

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1)

In most jurisdictions, the person entitled to subrogation, in addition to being entitled to any security held by the creditor, is substituted to the very debt itself, which, notwithstanding its payment and discharge, is kept alive for his benefit and protection.[1] "Equitable subrogation" operates by treating a new lien as a revival and assignment of a discharged obligation and security rather than as a substitution of a new obligation in place of another.[2]

Under the doctrine of subrogation, payment by the guarantor is treated not as creating a new debt and extinguishing the original debt but as preserving the original debt and merely substituting the guarantor for the creditor.[3] The doctrine of subrogation is founded on the fictional premise that an obligation extinguished by payment made by a third person is treated as still subsisting for the benefit of such third person.[4]

Footnotes

1 Scott Paper Co. v. Johnson, 406 S.W.2d 548 (Tex. Civ. App. Waco 1966); Allen v. See, 196 F.2d 608 (10th Cir. 1952).

2 Joondeph v. Hicks, 235 P.3d 303 (Colo. 2010).

3 Putnam v. C.I.R., 352 U.S. 82, 77 S. Ct. 175, 1 L. Ed. 2d 144 (1956).

4 St. Paul-Mercury Indem. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954).

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§ 63. Collateral securities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1)

One who is subrogated becomes entitled to whatever collateral securities the creditor may have as security for the debt and to the same benefits from such securities as the creditor might have had.[1]

Observation:

Subrogation as a remedy is particularly apt in cases where a plaintiff pays the secured debt of another and then seeks to assert the creditor's rights in the collateral.[2]

Footnotes

1 U.S. v. Continental Casualty Co., 512 F.2d 475 (5th Cir. 1975); Weast v. Arnold, 299 Md. 540, 474 A.2d 904, 38 U.C.C. Rep. Serv. 913 (1984); Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., 195 Neb. 292, 237 N.W.2d 645 (1976); Montefusco Excavating & Contracting Co., Inc. v. Middlesex County, 82 N.J. 519, 414 A.2d 961 (1980); Chemical Bank v. Meltzer, 93 N.Y.2d 296, 690 N.Y.S.2d 489, 712 N.E.2d 656 (1999); First Nat. Bank in Grand Forks v. Haugen Ford, Inc., 219 N.W.2d 847 (N.D. 1974); Fuller v. Stonewall Cas. Co. of W. Va., 172 W. Va. 193, 304 S.E.2d 347, 36 U.C.C. Rep. Serv. 684 (1983).

2 Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007).

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§ 64. Assignment to subrogee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1)

Generally speaking, it is not necessary to a complete legal subrogation that the one to whose rights another is subrogated shall make a formal assignment of the securities or other rights to the subrogee.[1] Thus, the right of a guarantor to pursue his subrogation rights is not dependent upon the assignment to him from the creditor; rather, the guarantor's subrogation rights result from the payment of the principal's debt.[2]

However, where the equitable right does not exist, the claimant's position will not be improved by an assignment.[3]

Footnotes

1 Hustad v. Reed, 133 Mont. 211, 321 P.2d 1083 (1958); Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N.W.2d 64 (1962); American Surety Co. of New York v. Multnomah County, 171 Or. 287, 138 P.2d 597, 148 A.L.R. 926 (1943).

2 Bradford Partners II, L.P. v. Fahning, 231 S.W.3d 513 (Tex. App. Dallas 2007).

3 Bank of Fort Mill v. Lawyers Title Ins. Corp., 268 F.2d 313 (4th Cir. 1959); Fidelity & Deposit Co. of Md. v. De Strajman, 215 Cal. App. 2d 10, 29 Cal. Rptr. 855 (1st Dist. 1963); Royal Indem. Co. v. Becker, 122 Ohio St. 582, 8 Ohio L. Abs. 386, 173 N.E. 194, 75 A.L.R. 1481 (1930).

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§ 65. Time of subrogation; effect of further charges by principal on securities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1)

A surety's right to subrogation begins as of the date of the execution of the suretyship contract, not as of the time of the principal's default or of the payment by the surety.[1] Though the surety's potential rights become an actuality when payment is made, they relate back to the date of execution of the suretyship bond or agreement.[2] However, one who merely has a prospective right of subrogation may not require, in advance of actually being subrogated, that certain assets (which the creditor might take in satisfaction of his claim) be held in reserve for his benefit.[3]

Footnotes

1 State, for Use of National Sur. Corp. v. Malvaney, 221 Miss. 190, 72 So. 2d 424, 43 A.L.R.2d 1212 (1954).

2 Fidelity and Deposit Co. of Maryland v. U. S., 183 Ct. Cl. 908, 393 F.2d 834 (1968); First Nat. Bank of St. Paul v. McHasco Elec., Inc., 273 Minn. 407, 141 N.W.2d 491 (1966); Schiska v. Schramm, 151 Or. 647, 51 P.2d 668 (1935).

3 Sawyer v. Zacavich, 178 Cal. App. 2d 605, 3 Cal. Rptr. 6 (2d Dist. 1960).

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§ 66. Amount of subrogation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 33(2)

Forms

Am. Jur. Legal Forms 2d § 241:10 (Subrogation to extent of loss or expense)

The general rule is that a subrogee is entitled to indemnity to the extent only of the money actually paid by him to discharge the obligation or the value of the property applied for that purpose.[1] Thus, a subrogee cannot sue for punitive damages.[2]

Footnotes

1 Krebs v. Bezler, 338 Mo. 365, 89 S.W.2d 935, 103 A.L.R. 1177 (1936); American Sur. Co. v. Hamrick Mills, 191 S.C. 362, 4 S.E.2d 308, 124 A.L.R. 1147 (1939); D'Angelo v. Cornell Paperboard Products Co., 19 Wis. 2d 390, 120 N.W.2d 70 (1963).

2 Maryland Cas. Co. v. Brown, 321 F. Supp. 309 (N.D. Ga. 1971) (applying Georgia law).

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§ 67. Amount of subrogation—Interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 33(1)

One who is subrogated to rights under a mortgage, note, judgment, or other instrument is generally entitled to recover, in addition to the principal sum expressed therein, interest from the date of payment.[1]

Footnotes

1 Federal Deposit Ins. Corp. v. Wilhoit, 297 Ky. 339, 180 S.W.2d 72 (1943); Royal Ins. Co., Limited, of Liverpool, England v. Atlantic Coast Line R. Co., 198 N.C. 518, 152 S.E. 503 (1930); Martin v. Hickenlooper, 90 Utah 150, 59 P.2d 1139, 107 A.L.R. 762 (1936).

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§ 68. Amount of subrogation—Costs and fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 33(1)

A subrogee is not be entitled to recover by way of subrogation costs and fees that he has not paid.[1] Moreover, since the subrogee can acquire only those rights that the subrogor had, he cannot recover counsel fees unless the creditor whom he paid could have done so.[2]

CUMULATIVE SUPPLEMENT

Cases:

Under Texas law, party who successfully brings suit based on doctrine of equitable subrogation can recover only the amount that he or she was required to pay because of defendant's actions; party cannot recover cost or expenses. Admiral Ins. Co., Inc. v. Arrowood Indem. Co., 471 B.R. 687 (N.D. Tex. 2012).

[END OF SUPPLEMENT]

Footnotes

1 Smith v. Wells, 72 Ind. App. 29, 122 N.E. 334 (1919).
A recovery by a treasurer's surety against a taxpayer with respect of penalties on account of delay in payment of taxes for which the county recovered judgment against the surety must be strictly limited to the amount of the penalties paid by the surety, with interest, and cannot include costs in the defense of the county's action against him. American Sur. Co. v. Hamrick Mills, 191 S.C. 362, 4 S.E.2d 308, 124 A.L.R. 1147 (1939).

2 Williams v. Johnston, 92 Idaho 292, 442 P.2d 178 (1968).

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§ 69. Priorities and preferences

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 7(1)

Where the party subrogated stands in all respects in the place of the creditor and is substituted to all his rights, claims, and remedies, he necessarily becomes entitled to whatever priorities and preferences that the creditor had.[1] In considering whether to order subrogation and, thus, bypass the general principle of priority, courts base their decisions on the equities, particularly the avoidance of windfalls and the absence of any prejudice to the interests of junior lienholders.[2]

Footnotes

1 Bramwell v. U.S. Fidelity & Guaranty Co., 269 U.S. 483, 46 S. Ct. 176, 70 L. Ed. 368 (1926); In re Sheaffer's Estate, 281 Pa. 138, 126 A. 205 (1924); Fox v. Kroeger, 119 Tex. 511, 35 S.W.2d 679, 77 A.L.R. 663 (1931); Woodyard v. Sayre, 90 W. Va. 295, 110 S.E. 689, 24 A.L.R. 1497 (1922).

2 Neu v. Gibson, 928 N.E.2d 556 (Ind. 2010).

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§ 70. Priorities and preferences—Of government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 33(2)

Where the government is entitled to a preference or priority in the assets of a debtor, an issue arises as to whether a surety who discharges an obligation due to the government is subrogated to such preference or priority—in this country, a surety who discharges an obligation due the government is generally subrogated to the priority or preference of the obligee.[1] Thus, a surety who has paid a state tax owed by the principal has been held subrogated not only to the claim but also to its quality of being nondischargeable in bankruptcy.[2]

Footnotes

1 Bramwell v. U.S. Fidelity & Guaranty Co., 269 U.S. 483, 46 S. Ct. 176, 70 L. Ed. 368 (1926); State ex rel. Southern Surety Co. v. Schlesinger, 114 Ohio St. 323, 4 Ohio L. Abs. 195, 151 N.E. 177, 45 A.L.R. 371 (1926); Fell v. Johnston, 154 Pa. Super. 470, 36 A.2d 227 (1944); St. Paul-Mercury Indem. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954).

2 St. Paul-Mercury Indem. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954).

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West's Key Number Digest

West's Key Number Digest, Subrogation 35, 38, 41(3)

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West's A.L.R. Digest, Subrogation 35, 38, 41(3)

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Am. Jur. Legal Forms 2d §§ 241:22 to 241:24
Am. Jur. Pleading and Practice Forms, Subrogation §§ 17 to 20

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V. Defenses

§ 71. Generally; defenses including statute of limitations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 38

A.L.R. Library

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844

Forms

Am. Jur. Pleading and Practice Forms, Subrogation § 18 (Answer—statute of limitations)

The subrogee, who succeeds to the position of the subrogor, may recover only if the subrogor likewise could have recovered;[1] a subrogee is subject to any defenses which may be raised against the subrogor.[2] Subrogation places the subrogated party in the shoes of the creditor and entitles him to the rights which the creditor had in respect to the debt or obligation; defenses which would not have been available against the creditor or obligee, likewise, cannot be interposed against the subrogee, including the defense of limitations.[3]

In determining the statute of limitations itself, in some cases—particularly torts—the statute of limitations for subrogation, in some jurisdictions, is the same statute of limitations as the underlying action[4] although not all jurisdictions agree with this rule.[5]

Where subrogation is claimed to rights under a written instrument, it has been held that if the original creditor would not have been barred by limitations, neither will the subrogee.[6] However, the converse is also true; a subrogee who satisfies an obligation is subject to the statute of limitations just as the holder would have been had it proceeded directly against the maker.[7]

If a subrogor lacks standing[8] or is barred by res judicata from maintaining claims, a subrogee is equally barred.[9]

Whether a defense lies for a particular case may depend upon the form of subrogation sought; the defense that a party claiming rights of subrogation is a mere volunteer is available against a claim based on legal subrogation but not against a claim based on conventional subrogation.[10]

Footnotes

1 Feigenbaum v. Guaracini, 402 N.J. Super. 7, 952 A.2d 511 (App. Div. 2008).

2 Peerless Ins. Co. v. Michael Beshara, Inc., 75 A.D.3d 733, 903 N.Y.S.2d 833 (3d Dep't 2010).

3 U.S. v. California, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993); Home Ins. Co. v. Stuart-McCorkle, Inc., 291 Ala. 601, 285 So. 2d 468, 91 A.L.R.3d 833 (1973); Government Employees Ins. Co. v. Group Hospitalization Medical Services, Inc., 322 Md. 645, 589 A.2d 464 (1991); Yerkovich v. AAA, 461 Mich. 732, 610 N.W.2d 542 (2000); Briney v. U.S. Fidelity & Guar. Co., 714 So. 2d 962 (Miss. 1998); Swingley v. Riechoff, 112 Mont. 59, 112 P.2d 1075 (1941); Dairyland Ins. Co. v. Herman, 1998-NMSC-005, 124 N.M. 624, 954 P.2d 56 (1997); Galanos v. Cleveland, 70 Ohio St. 3d 220, 1994-Ohio-401, 638 N.E.2d 530 (1994); Moore v. White, 1979 OK 159, 603 P.2d 1119, 28 U.C.C. Rep. Serv. 426 (Okla. 1979); State, By and Through Healy v. Smither, 290 Or. 827, 626 P.2d 356 (1981); Johnson v. Beane, 541 Pa. 449, 664 A.2d 96 (1995); Hawkins v. Gadoury, 713 A.2d 799 (R.I. 1998); Hudson for Ben. of Hudson v. Hudson Mun. Contractors, Inc., 898 S.W.2d 187 (Tenn. 1995); Guillot v. Hix, 838 S.W.2d 230 (Tex. 1992); Solomon v. Design Development, Inc., 143 Vt. 128, 465 A.2d 234 (1983); State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 225 Wis. 2d 305, 592 N.W.2d 201, 38 U.C.C. Rep. Serv. 2d 751 (1999).
A statute stating a registrar of contractors "shall promptly enforce" subrogation claims against contractors did not operate as a statute of limitations barring the registrar from bringing a subrogation claim against contractors 2 ½ years after it made payment to an injured party from the registrar's residential recovery fund; the plain language of the statute did not state a specific time limit for enforcement, and nothing in the history or context of the statute suggested the statute was intended to be a shield to protect non-compliant contractors. State ex rel. Arizona Registrar of Contractors v. Johnston, 222 Ariz. 353, 214 P.3d 441 (Ct. App. Div. 1 2009).

4 Dow Chemical Corp. v. Weevil-Cide Co., Inc., 897 F.2d 481, 29 Fed. R. Evid. Serv. 1394 (10th Cir. 1990); General Acc. Ins. Co. of America v. Schoendorf & Sorgi, 202 Wis. 2d 98, 549 N.W.2d 429 (1996) (legal malpractice).

5 Regents of University of California v. Hartford Acc. & Indem. Co., 21 Cal. 3d 624, 147 Cal. Rptr. 486, 581 P.2d 197 (1978) (holding a surety may be subrogated to any causes of action either a debtor or creditor have against third parties responsible for the loss, and such causes of action should not be affected by the period of limitations governing the original debt).

6 Train v. Emerson, 141 Ga. 95, 80 S.E. 554 (1913); Gooch v. Gooch, 70 W. Va. 38, 73 S.E. 56 (1911).
The period of limitations as to the rights of the subrogee of a judgment is the same as that applicable to the judgment in the hands of the original creditor. Guillot v. Hix, 838 S.W.2d 230 (Tex. 1992); Smith v. Davis, 71 W. Va. 316, 76 S.E. 670 (1912).

7 Stewart v. Jones, 614 So. 2d 1023, 22 U.C.C. Rep. Serv. 2d 1056 (Ala. 1993).

8 Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85 (Minn. 1987).

9 Community Nat. Bank v. Fidelity & Deposit Co. of Maryland, 563 F.2d 1319 (9th Cir. 1977) (creditor barred by prior judgment); Perkins v. Scaffolding Rental and Erection Service, Inc., 568 So. 2d 549 (La. 1990).

10 Hartford Fire Ins. Co. v. Western Fire Ins. Co., 226 Kan. 197, 597 P.2d 622 (1979).

Volunteers, generally, see §§ 20, 21.

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73 Am. Jur. 2d Subrogation § 72

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§ 72. Estoppel and laches

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(3)

Forms

Am. Jur. Pleading and Practice Forms, Subrogation § 20 (Answer—laches)

A plaintiff suing as a subrogee is subject to whatever rules of estoppel would apply to the insured.[1]

The right to subrogation, being merely equitable, may, like other equitable rights, be lost by laches or delay in asserting it.[2] It should not be allowed in favor of one who has permitted the equity that he asserts to sleep in secrecy until the rights of others would be injuriously affected by its assertion and enforcement.[3]

Footnotes

1 Employers' Fire Ins. Co. v. Brookner, 47 A.D.3d 754, 850 N.Y.S.2d 554 (2d Dep't 2008).

2 Payne v. Standard Acc. Ins. Co., 259 S.W.2d 491 (Ky. 1952).

3 Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962).

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73 Am. Jur. 2d Subrogation § 73

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§ 73. Waiver

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 35

A.L.R. Library

Conduct or Inaction by Insurer Constituting Waiver of, or Creating Estoppel to Assert, Right of Subrogation, 125 A.L.R.5th 1

Forms

Am. Jur. Legal Forms 2d §§ 241:22 to 241:24 (Waiver)

Subrogation, being an equity springing from the relation between the parties and created and enforced for the benefit and protection of one in whose favor it is originated, may be asserted or waived.[1] The waiver may either be express or by implication, either by contract or by conduct,[2] or it may be gleaned from the plain language of a contract.[3] Such waivers only apply to parties who had agreed to such a waiver,[4] and a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears.[5] Similarly, a waiver of a right of subrogation must be by an act of the subrogee; it cannot be contracted away by the conduct or agreement of third parties.[6]

A contractual waiver of subrogation is enforceable against gross negligence claims.[7]

Waiver of subrogation clauses in leases are enforceable even in the absence of a requirement that either party purchase insurance.[8]

Observation:

Parties to a contract may waive their subrogation rights, and absent fraud, the waiver will be held valid and enforceable.[9] However, a waiver of subrogation rights will be found only where the subrogated party has specifically and unequivocally relinquished those rights.[10]

Waiver of subrogation clauses are necessarily premised on the procurement of insurance by the parties.[11] A property owner's waiver of subrogation for losses covered by property insurance results not just if a contract requires the owner to provide property insurance postconstruction but also if the owner secures coverage for the property after final payment.[12] A "subrogation waiver" in a construction contract, which requires the parties to waive their right to claim damages against one another up to the amount of insurance coverage available for their losses, is a risk-shifting provision premised upon the recognition that it is economically inefficient for parties to a contract to insure against the same risk.[13] In other words, a waiver of subrogation provision in a construction contract is a mechanism for reducing litigation by preventing claims from arising and by substituting the contractual protection of insurance for the uncertain and expensive protection of liability litigation.[14]

Footnotes

1 Commercial Union Ins. Co. v. Bituminous Cas. Corp., 851 F.2d 98 (3d Cir. 1988); In re Larbar Corp., 177 F.3d 439, 1999 FED App. 0180P (6th Cir. 1999); Olivas v. U.S., 506 F.2d 1158 (9th Cir. 1974); Moody v. Hinton, 603 So. 2d 912 (Ala. 1992); Connecticut Nat. Bank v. Douglas, 221 Conn. 530, 606 A.2d 684, 17 U.C.C. Rep. Serv. 2d 999 (1992); May Dept. Store v. Center Developers, Inc., 266 Ga. 806, 471 S.E.2d 194 (1996); Brodsky v. Princemont Const. Co., 30 Md. App. 569, 354 A.2d 440 (1976); Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. 1995); Skauge v. Mountain States Tel. & Tel. Co., 172 Mont. 521, 565 P.2d 628 (1977); O'Grady v. First Union Nat. Bank, 296 N.C. 212, 250 S.E.2d 587, 26 U.C.C. Rep. Serv. 146 (1978); St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp., 275 N.W.2d 304 (N.D. 1979); Sampson v. Logue, 184 Wis. 2d 20, 515 N.W.2d 917 (Ct. App. 1994).
A right of subrogation may be waived or limited by agreement. Skulskie v. Ceponis, 404 N.J. Super. 510, 962 A.2d 589 (App. Div. 2009).

2 Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 16 A.L.R.2d 1261 (1950); Ray v. Donohew, 177 W. Va. 441, 352 S.E.2d 729 (1986); Jindra v. Diederich Flooring, 181 Wis. 2d 579, 511 N.W.2d 855 (1994).
Public employees benefit trust fund's substantial delay before raising a subrogation claim as a health care plan administrator waived or defeated a contractual right to subrogation in the settlement proceeds of a subscriber's medical malpractice action; the administrator paid medical benefits for a child who suffered a severe birth injury that was likely to give rise to litigation, and the administrator waited more than five months after approval of the settlement, employed experienced attorneys to identify potential subrogation claims, and was in a position to discover its potential claim far in advance of the date of first notice. Valora v. Pennsylvania Employees Benefit Trust Fund, 595 Pa. 574, 939 A.2d 312 (2007).

3 Willis Realty Associates v. Cimino Const. Co., 623 A.2d 1287 (Me. 1993).

4 Willis Realty Associates v. Cimino Const. Co., 623 A.2d 1287 (Me. 1993); Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc., 119 Wash. 2d 334, 831 P.2d 724, 19 U.C.C. Rep. Serv. 2d 1041 (1992).

5 Footlocker, Inc. v. KK & J, LLC, 69 A.D.3d 481, 894 N.Y.S.2d 380 (1st Dep't 2010).

6 St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp., 275 N.W.2d 304 (N.D. 1979).

7 Lexington Ins. Co. v. Entrex Communication Services, Inc., 275 Neb. 702, 749 N.W.2d 124 (2008).

A waiver of subrogation may bar a claim for gross negligence. Footlocker, Inc. v. KK & J, LLC, 69 A.D.3d 481, 894 N.Y.S.2d 380 (1st Dep't 2010).

8 Hancock Fabrics, Inc. v. Alterman Real Estate I, Inc., 302 Ga. App. 568, 692 S.E.2d 20 (2010), cert. denied, (July 12, 2010).

9 Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc., 119 Wash. 2d 334, 831 P.2d 724, 19 U.C.C. Rep. Serv. 2d 1041 (1992).

10 Lopez v. Concord General Mut. Ins. Group, 155 Vt. 320, 583 A.2d 602 (1990).

11 Footlocker, Inc. v. KK & J, LLC, 69 A.D.3d 481, 894 N.Y.S.2d 380 (1st Dep't 2010).

A "waiver of subrogation" clause in a commercial lease agreement validly waived the subrogation rights of the lessor's insurers, and thus, the lessor was barred from bringing an action against the lessee to recover the sums paid to the lessee's employees who were injured on the leased premises prior to the lessee's taking possession where the waiver clause unequivocally provided that the parties mutually waived all rights of recovery against the other when the loss was insured against under any insurance policy in force at the time of loss, and the lessor's insurance policy provided coverage for the losses. Bakowski v. Mountain States Steel, Inc., 2002 UT 62, 52 P.3d 1179 (Utah 2002).

12 Middleoak Ins. Co. v. Tri-State Sprinkler Corp., 77 Mass. App. Ct. 336, 931 N.E.2d 470 (2010).

13 Hartford Underwriters Ins. Co. v. Phoebus, 187 Md. App. 668, 979 A.2d 299 (2009), judgment aff'd, 415 Md. 313, 999 A.2d 1066 (2010).

A waiver of subrogation clause contained in an American Institute of Architects (AIA) construction contract between a property owner and a contractor did not violate either public policy or state common law principles as the purpose of the insurance procurement provision in which the clause was contained, which required the property owner to purchase and maintain "all-risk" property insurance or to notify the general contractor in writing before work began if the owner did not intend to purchase such insurance, was to protect both the owner and contractor from the consequences of litigation and the losses which might otherwise disrupt performance under the contract, and the clause did not attempt to transfer liability for negligence away from the tortfeasor. Jalapenos, LLC v. GRC General Contractor, Inc., 2007 PA Super 391, 939 A.2d 925 (2007).

14 RLI Ins. Co. v. Southern Union Co., 341 S.W.3d 821 (Mo. Ct. App. W.D. 2011).

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Research References

West's Key Number Digest

West's Key Number Digest, Subrogation 41(.5) to 41(7)

A.L.R. Library

A.L.R. Index, Subrogation
West's A.L.R. Digest, Subrogation 41(.5) to 41(7)

Forms

Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure § 645
Am. Jur. Pleading and Practice Forms, Parties § 135
Am. Jur. Pleading and Practice Forms, Workers' Compensation §§ 408, 409

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73 Am. Jur. 2d Subrogation § 74

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§ 74. Subrogee and obligee compared

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(.5)

Forms

Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure § 645 (Complaint—Allegation—Insurer of original claimant as real party in interest—Subrogation claim against United States)

Subrogation places the surety or other subrogated party in the shoes of the creditor or obligee, and a surety may enforce the obligation in the same manner and generally to the same extent that the creditor or obligee could have enforced it.[1] A subrogee is not restricted to using the same forum for enforcing his rights as the subrogor may have been.[2]

Footnotes

1 American Surety Co. of New York v. Bethlehem Nat. Bank of Bethlehem, Pa., 314 U.S. 314, 62 S. Ct. 226, 86 L. Ed. 241, 138 A.L.R. 509 (1941); East Boston Sav. Bank v. Ogan, 428 Mass. 327, 701 N.E.2d 331 (1998); Fox v. Kroeger, 119 Tex. 511, 35 S.W.2d 679, 77 A.L.R. 663 (1931).

2 Appalachian Ins. Co. of Providence v. Betts, 213 Kan. 609, 518 P.2d 385 (1974).

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§ 75. Necessity of proceedings to establish right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 41(1)

Subrogation is not a cause of action in and of itself.[1] Where one acquires a right by subrogation, that right is not a separate cause of action from the right held by the subrogor.[2] Thus, subrogation rights do not arise spontaneously and are not free floating or open ended.[3] It is not a substantive tangible right of such nature and character that it can be seized and held and enjoyed independently of a judicial proceeding but is a right of action only, and to establish it, resort must be had to an appropriate proceeding in the courts.[4] In the natural order of precedence, the party must establish his right to be subrogated to the security before he is permitted to enforce it.[5]

However, where a right by way of subrogation is asserted in a court of law, it is not required that the right should first be established by a separate suit in equity.[6]

Practice Tip:

Subrogation, like any other legal action, is subject to general rules that govern proof of obligation, and hence, a cause of action must still be proven for subrogation to be ordered or awarded.[7]

Footnotes

1 Pulte Home Corp. v. Parex, Inc., 174 Md. App. 681, 923 A.2d 971 (2007), judgment aff'd, 403 Md. 367, 942 A.2d 722, 65 U.C.C. Rep. Serv. 2d 430 (2008).

2 Konkel v. Acuity, 321 Wis. 2d 306, 2009 WI App 132, 775 N.W.2d 258 (Ct. App. 2009).

3 City of Union City v. Veals, 247 N.J. Super. 478, 589 A.2d 1028 (App. Div. 1991).

4 U.S. v. California, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993); Watters v. State, Dept. of Transp. and Development, 768 So. 2d 733 (La. Ct. App. 2d Cir. 2000); Casstevens v. Smith, 269 S.W.3d 222 (Tex. App. Texarkana 2008).

5 Offer v. Superior Court of City and County of San Francisco, 194 Cal. 114, 228 P. 11 (1924); City of Union City v. Veals, 247 N.J. Super. 478, 589 A.2d 1028 (App. Div. 1991); American Sur. Co. v. Hamrick Mills, 194 S.C. 221, 9 S.E.2d 433 (1940).

6 A. F. C., Inc. v. Brockett, 257 Cal. App. 2d 40, 64 Cal. Rptr. 771 (1st Dist. 1967).

7 A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995).

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§ 76. Conditions precedent; demand

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(2)

The rules as to demand or other condition precedent to an action are applicable to actions to enforce subrogation.[1] Thus, a party who asserts rights by way of subrogation must do more than assume that he is subrogated to the rights to the original creditor.[2] There is no condition or requirement that mandates that prior to the bringing of an action for subrogation, the party seeking the relief must have obtained an assignment or release of the underlying obligation.[3] In tort cases, however, the party seeking equitable subrogation must have obtained a release for the other party responsible for the debt.[4]

Footnotes

1 Wilson v. Todd, 217 Ind. 183, 26 N.E.2d 1003, 129 A.L.R. 192 (1940); First Union Nat. Bank of North Carolina v. Lindley Laboratories, Inc., 132 N.C. App. 129, 510 S.E.2d 187 (1999).

2 Criss v. Folger Drilling Co., 195 Kan. 552, 407 P.2d 497 (1965).

3 Dow Chemical Corp. v. Weevil-Cide Co., Inc., 897 F.2d 481, 29 Fed. R. Evid. Serv. 1394 (10th Cir. 1990) (applying Wisconsin law).

4 State Farm Mut. Auto. Ins. Co. v. Johnson, 18 So. 3d 1099 (Fla. 2d DCA 2009).

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§ 77. Jurisdiction; action as in law or equity

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(1)

In some jurisdictions, subrogation, being a doctrine of equity, has been enforceable in equity courts, and even where recovery was permitted in an action at law on the theory of implied contract, the equitable jurisdiction still existed.[1]

More recently, however, under code and statutory provisions, courts of law—just like courts of equity—have been given jurisdiction to allow subrogation.[2] However, the right of subrogation will not be recognized at law unless the right of action made the subject thereof is legal in its nature and cognizable at law.[3] In an action based on conventional subrogation, in which no equitable relief is prayed for, subrogation is an action at law not controlled by equitable principles.[4] A right to subrogation may be established in third-party claim proceedings, as well as in direct two-party actions at law.[5]

Footnotes

1 Phillips v. Liberty Mut. Ins. Co., 43 Del. Ch. 436, 235 A.2d 835 (1967).

2 A. F. C., Inc. v. Brockett, 257 Cal. App. 2d 40, 64 Cal. Rptr. 771 (1st Dist. 1967); Geneva Const. Co. v. Martin Transfer & Storage Co., 351 Ill. App. 289, 114 N.E.2d 906 (2d Dist. 1953), judgment aff'd, 4 Ill. 2d 273, 122 N.E.2d 540 (1954); Roberts v. Total Health Care, Inc., 109 Md. App. 635, 675 A.2d 995 (1996), aff'd, 349 Md. 499, 709 A.2d 142 (1998).

3 Standard Acc. Ins. Co. v. Pellecchia, 15 N.J. 162, 104 A.2d 288 (1954).

4 First Nat. Bank of Atlanta v. American Sur. Co., 71 Ga. App. 112, 30 S.E.2d 402 (1944).

5 A. F. C., Inc. v. Brockett, 257 Cal. App. 2d 40, 64 Cal. Rptr. 771 (1st Dist. 1967).

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§ 78. Parties

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(4)

A.L.R. Library

Diversity of citizenship between subrogee, subrogor, and defendant for purposes of Federal jurisdiction of action based on subrogation, 6 A.L.R.2d 137

Forms

Am. Jur. Pleading and Practice Forms, Parties § 135 (Petition or application for intervention—By compensation carrier—Subrogation)
Am. Jur. Pleading and Practice Forms, Workers' Compensation §§ 408, 409 (Intervention)

A subrogation action may be brought by the subrogee in the name of the subrogor.[1] However, the subrogee may sue in his own name, and he may also maintain an action for subrogation in his own name for a real party in interest.[2]

Observation:

The purpose of the rule requiring that an action be prosecuted in the name of the real party in interest is to protect litigants from harassment and multiple suits by persons who would not be bound by principles of res judicata and to enable a defendant to present his defenses against proper persons and to proceed to finality of judgment.[3] Additionally, the purpose of the rule is to avoid confusion over who the proper plaintiff is.[4]

Thus, a subrogee, as a real party in interest, has the right to bring a separate action against a third party for damages paid to a subrogor arising out of a cause of action which the subrogor has against a third party.[5] Furthermore, in some jurisdictions, an action at law by the subrogee in its own name is permitted.[6]

A subrogee has been allowed to bring an action in its own name against a third-party tortfeasor though the subrogee was only a partial owner of the subrogor's cause of action.[7]

All those whose rights would be affected by the operation of the judgment or decree of subrogation should have an opportunity to be heard and should be made parties.[8]

CUMULATIVE SUPPLEMENT

Cases:

Automobile insurer's failure to style its property damage lawsuit as a subrogation action by bringing the action in its own name, rather than in the name of its insured, did not preclude application of the statutory exception to the res judicata doctrine to personal injury action brought by its insured against the same defendants; insured retained a de minimis financial stake in the outcome of the subrogation proceeding because he had not been reimbursed for his deductible, and thus, insurer-subrogee was not the only remaining real party-in-interest to the subrogation action required to file the action in its own name. S.H.A. 735 ILCS 5/2–403(c, d). Gadson v. Among Friends Adult Day Care, Inc., 2015 IL App (1st) 141967, 395 Ill. Dec. 701, 39 N.E.3d 168 (App. Ct. 1st Dist. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Fort Bragg Unified School Dist. v. Solano County Roofing, Inc., 194 Cal. App. 4th 891, 124 Cal. Rptr. 3d 144, 266 Ed. Law Rep. 852 (1st Dist. 2011).

2 Travelers' Ins. Co. v. Great Lakes Engineering Works Co., 184 F. 426 (C.C.A. 6th Cir. 1911); Maryland Cas. Co. v. King, 1963 OK 95, 381 P.2d 153 (Okla. 1963).

A subrogated title insurer which settled a government's claim against its insured's property in an action to foreclose a federal tax lien was a real party in interest and entitled to substitution for the insured with respect to the insured's cross-claim against the vendors of the property. U.S. v. Lacy, 234 F.R.D. 140 (S.D. Tex. 2005).

An insurer who, through mistake of attorney, had been named as the subrogee of the insured, in a negligence action against a lessee and sublessee of a warehouse destroyed by fire, lacked standing to sue and thus could not move to substitute the true subrogee insurer as the real party in interest; purported subrogee had admittedly not suffered injury in fact. Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 53 Fed. R. Serv. 3d 365, 2002 FED App. 0253P (6th Cir. 2002).

3 Turner v. Haynes, 489 So. 2d 494 (Miss. 1986).

4 Corona v. Southern Guaranty Ins. Co., Inc., 294 Ala. 184, 314 So. 2d 61 (1975).

5 Emmco Ins. Co. v. White Motor Corp., 429 A.2d 1385 (D.C. 1981).

A title insurer, as the subrogee of its insured, a defrauded lender in a fraudulent real estate loan transaction, had standing to assert an action on behalf of the lender's agent for conversion and negligent negotiation, under New York law, against the depository bank; although the lender's agent had a separate state action to recover the funds, the lender's agent purchased cashier's checks from the lender for loan proceeds with the lender's funds, the checks were forged and deposited with the depository bank, and double recovery could not result since if the depository bank were found liable in either the agent's or insurer's action, a judgment in the first would bar judgment in the second. Old Republic Nat. Title Ins. Co. v. Bank of East Asia Ltd., 291 F. Supp. 2d 60, 51 U.C.C. Rep. Serv. 2d 1150 (D. Conn. 2003).

6 Geneva Const. Co. v. Martin Transfer & Storage Co., 351 Ill. App. 289, 114 N.E.2d 906 (2d Dist. 1953), judgment aff'd, 4 Ill. 2d 273, 122 N.E.2d 540 (1954).

7 Geneva Const. Co. v. Martin Transfer & Storage Co., 351 Ill. App. 289, 114 N.E.2d 906 (2d Dist. 1953), judgment aff'd, 4 Ill. 2d 273, 122 N.E.2d 540 (1954).

8 Rush v. Alaska Mortg. Group, 937 P.2d 647 (Alaska 1997); Berger v. City of Vinita, 1934 OK 519, 170 Okla. 214, 40 P.2d 1 (1934); Cooper v. Sagert, 111 Or. 27, 223 P. 943 (1924).

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VI. Practice and Procedure

§ 79. Pleading

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Subrogation 41(5)

Ordinarily, subrogation, whether sought by the plaintiff or by the defendant, must be pleaded,[1] and the facts out of which the right of subrogation arises must be set forth.[2] However, a plaintiff does not need to mention specifically subrogation in order to obtain relief under the doctrine.[3] Pleadings that do not specifically claim a right to subrogation are sufficient if the essential elements necessary for its application are alleged.[4] Other courts have gone even further and held that the failure to plead subrogation in a cross complaint is not necessarily fatal since the failure to plead subrogation can be cured by amendment.[5] Furthermore, the failure to properly plead a subrogation action can be cured and will be allowed to be cured by the court if no objection to the amendment or clarification is made by opposing parties, and the evidence supports the amendment.[6] Finally, pleading subrogation does not create a new cause of action—in other words, pleading subrogation does not change the identity of the underlying cause of action.[7] However, if a party wishes to preserve its action for appeal—i.e., the party seeking subrogation—that party must independently make such a reservation, and it cannot rely on reservations made by other parties.[8]

Footnotes

1 Jack v. Wong Shee, 33 Cal. App. 2d 402, 92 P.2d 449 (1st Dist. 1939); Hertz Corp. v. Stuart, 422 So. 2d 38 (Fla. 4th DCA 1982); Cagle, Inc. v. Sammons, 198 Neb. 595, 254 N.W.2d 398 (1977); Price v. Lovins, 117 W. Va. 624, 187 S.E. 318 (1936).

2 Cagle, Inc. v. Sammons, 198 Neb. 595, 254 N.W.2d 398 (1977); Price v. Lovins, 117 W. Va. 624, 187 S.E. 318 (1936).
A home builder did not allege the existence of a debt or obligation for which the manufacturer of a synthetic stucco product used in an exterior barrier system on houses was primarily liable and thus did not have a cause of action for legal subrogation against the manufacturer; the builder merely contended that it extinguished a debt that the manufacturer owed to homeowners without setting forth the legal basis of the debt. Pulte Home

Corp. v. Parex, Inc., 174 Md. App. 681, 923 A.2d 971 (2007), judgment aff'd, 403 Md. 367, 942 A.2d 722, 65 U.C.C. Rep. Serv. 2d 430 (2008).

3 Hill v. Cross Country Settlements, LLC, 402 Md. 281, 936 A.2d 343 (2007).

4 George L. Schnader, Jr., Inc. v. Cole Bldg. Co., 236 Md. 17, 202 A.2d 326 (1964); Western Surety Co. v. Walter, 44 S.D. 112, 182 N.W. 635, 24 A.L.R. 1519 (1921) (holding that, ordinarily, subrogation should be plead; however, in the absence of such a pleading, equity may grant relief under a general prayer for relief if it is justified by the facts alleged and established).

An assignee of a mortgage in its complaint sufficiently alleged claims for equitable lien or equitable title, and equitable subrogation, in an action brought against the estate of a decedent, who had owned the mortgaged property with the two mortgagors, seeking declarations that the estate was liable on the mortgage note as a borrower and that it had a first lien position on the mortgaged property, by alleging that the monies loaned by its predecessor in interest were actually loaned to and for the benefit of the decedent in addition to the two mortgagors; that the monies were used to improve and maintain the mortgaged property for the benefit of all the title owners; that the monies were used to satisfy the prior first mortgage on the property; that when its predecessor in interest loaned the monies, it intended to occupy a first lien position; and that the decedent's wife, who was one of the mortgagors, was to inherit decedent's interest in the property. OneWest Bank, FSB v. Marshall, 18 A.3d 715 (D.C. 2011).

5 Webster v. Klug and Smith, 81 Wis. 2d 334, 260 N.W.2d 686 (1978).

6 Webster v. Klug and Smith, 81 Wis. 2d 334, 260 N.W.2d 686 (1978).

7 Totsky v. Riteway Bus Service, Inc., 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637 (2000).

Subrogation as not a cause of action in and of itself, see § 75.

8 Totsky v. Riteway Bus Service, Inc., 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637 (2000).

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§ 80. Evidence

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(6)

If the alleged facts, on which the right of subrogation depends, are put in issue, they must be established by proof as in any other civil action.[1] In other words, subrogation is subject to the general rules that govern proof of obligation.[2] The burden is generally on the party claiming subrogation to show that he is entitled to it[3] and must prove the existence and applicability of equitable principles.[4] A party claiming a right of subrogation must establish that he is not a volunteer but, instead, is under a compulsion to satisfy the debt.[5]

However, in certain cases, the party seeking subrogation need only make out a prima facie case, and once he has done so, the burden shifts to the defendant to disprove that fact.[6] The person seeking subrogation must make out a clear case,[7] and he must establish all the elements of the doctrine.[8] If the evidence supports the subrogation action, then subrogation should be ordered.[9] Conversely, subrogation will be refused where the facts established do not justify such relief.[10] If subrogation is disputed, the obligee's intention must be shown by clear proof that the acts of the obligee unquestionably imply it.[11]

In the case of conventional subrogation, the party seeking to impose subrogation on another party under an express contractual provision must presumably prove the existence and also the applicability of such a provision.[12] This rule follows from the general proposition that contractual subrogation clauses are controlled by contract principles.[13]

Footnotes

1 Boyles v. Bridgeman, 342 So. 2d 1150 (La. Ct. App. 1st Cir. 1977); Cooper v. Sagert, 111 Or. 27, 223 P. 943 (1924).

2 A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995).

3 Del E. Webb Hotel Co. v. Bentley, 8 Ariz. App. 408, 446 P.2d 687 (1968); First Ins. Co. of Hawaii, Ltd. v. Jackson, 67 Haw. 165, 681 P.2d 569 (1984); Wells Fargo Bank, Minnesota, N.A. v. Com., Finance and Admin., Dept. of Revenue, 345 S.W.3d 800 (Ky. 2011), as corrected, (Aug. 25, 2011) (equitable subrogation); Security Ins. Co. of New Haven-The Connecticut Indem. Co. v. Mangan, 250 Md. 241, 242 A.2d 482, 5 U.C.C. Rep. Serv. 621 (1968); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007); Sunshine v. Bankers Trust Co., 34 N.Y.2d 404, 358 N.Y.S.2d 113, 314 N.E.2d 860, 14 U.C.C. Rep. Serv. 1416 (1974); Day Cruises Maritime, L.L.C v. Christus Spohn Health System, 267 S.W.3d 42 (Tex. App. Corpus Christi 2008) (equitable subrogation); Cunningham v. Metropolitan Life Ins. Co., 121 Wis. 2d 437, 360 N.W.2d 33 (1985).

4 Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007).

Principles of equity and justice as controlling, see § 11.

5 Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000) (applying Illinois law).

Volunteers, generally, see §§ 20, 21.

6 Brooks v. Resolution Trust Corp., 599 So. 2d 1163 (Ala. 1992) (holding, as to issue of notice of overlooking a recorded encumbrance, that once the plaintiff established the absence of knowledge of the encumbrance that the burden shifted to the defendant to prove culpable neglect).

7 Security Ins. Co. of New Haven-The Connecticut Indem. Co. v. Mangan, 250 Md. 241, 242 A.2d 482, 5 U.C.C. Rep. Serv. 621 (1968); Walrus Mfg. Co. v. McMehen, 1913 OK 676, 39 Okla. 667, 136 P. 772 (1913).

8 Indemnity Ins. Co. of North America v. Otis Elevator Co., 315 Mich. 393, 24 N.W.2d 104, 171 A.L.R. 266 (1946); Gerow v. Sinay, 28 Misc. 3d 990, 905 N.Y.S.2d 827 (Sup 2010).

9 Rock River Lumber Corp. v. Universal Mortg. Corp. of Wisconsin, 82 Wis. 2d 235, 262 N.W.2d 114 (1978).

10 Security Ins. Co. of New Haven-The Connecticut Indem. Co. v. Mangan, 250 Md. 241, 242 A.2d 482, 5 U.C.C. Rep. Serv. 621 (1968) (holding proof that the plaintiff paid the debt is insufficient without proof that he did so otherwise than as a volunteer); Western Surety Co. v. Walter, 44 S.D. 112, 182 N.W. 635, 24 A.L.R. 1519 (1921).

11 A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So. 2d 1292 (La. 1995).

12 Firstmark Standard Life Ins. Co. v. Superior Bank FSB, 271 Ill. App. 3d 435, 208 Ill. Dec. 409, 649 N.E.2d 465 (1st Dist. 1995); Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 921 A.2d 369 (2007) (burden of proving contractual provisions as to subrogation); Jindra v. Diederich Flooring, 181 Wis. 2d 579, 511 N.W.2d 855 (1994).

Conventional subrogation, see § 4.

13 Nationwide Mut. Fire Ins. Co. v. Sonitrol, Inc. of Cleveland, 109 Ohio App. 3d 474, 672 N.E.2d 687, 114 Ed. Law Rep. 293 (8th Dist. Cuyahoga County 1996).

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§ 81. Trial, decision, and review

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West's Key Number Digest

West's Key Number Digest, Subrogation 41(7)

The issues of a subrogation case must, of course, be confined to those raised by the pleadings.[1] Where, in an action against a principal and surety, the issue as to their suretyship relation has been presented and determined, it need not be relitigated in an action to subrogate the surety to the rights of the creditor against the principal.[2] The relief must not, of course, exceed in amount that to which the subrogee is entitled.[3]

As to the trial itself, generally speaking, since subrogation is an equitable remedy, there is no right to a jury trial.[4]

Footnotes

1 Nelson v. Webster, 72 Neb. 332, 100 N.W. 411 (1904).
Pleading, generally, see § 79.

2 Nelson v. Webster, 72 Neb. 332, 100 N.W. 411 (1904).

3 American Sur. Co. v. Hamrick Mills, 191 S.C. 362, 4 S.E.2d 308, 124 A.L.R. 1147 (1939).

4 Landrum v. National Union Ins. Co., 1996 OK 18, 912 P.2d 324 (Okla. 1996).

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